12-2297pr

To be argued by:
D. B. KARRON

United States Court of Appeals

FOR THE SECOND CIRCUIT
Docket No. 12-2297

DANIEL B. KARRON,

Petitioner - Appellant,

—v.—

UNITED STATES OF AMERICA,

Respondent - Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX Volume 11 FOR THE PETITIONER - APPELLANT

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Riley's data base. So let's go take a look at government Exhibit 110, page 38 of 44, they are all right there. Ms. Riley is an auditor. She might not have been the most articulate witness, but she didn't overlook these checks. What government exhibit 110, page 38 of 44 shows, is that while Dr. Karron did put money into CASI, he also made CASI loan him money, a lot of money. And at the end of the day, once you subtract the numbers, and you take into account tax withholding, Dr. Karron ended up taking out more money from CASI than what he loaned CASI and what he is entitled to in salary. And the ATP grant ended up being the only source of funding that went into CASI's business account in year one. And that's exactly what government Exhibit 112 shows.

But you don't have to rely on numbers alone. You also heard the testimony of Lee Gerfein. Mr. Gerfein told you that he spent 25 percent of his time at CASI fund raising trying to get CASI additional sources funding, aside from the ATP fund. But Mr. Gerfein told you he was unsuccessful and didn't bring in any money at all while he was at the company during year one of the grant. His testimony is fully consistent with what government Exhibit 112 shows.

Now let's go to year two, government Exhibit 113. Again for year two, the purple area represents how CASI's accounts were funded by the ATP grant on that. You can see for yourselves that for virtually all the money, it came from ATP

except for a tiny slice there, which summed up to approximately $1700, which came from miscellaneous refund checks. Again, this is fully consistent with the testimony of the last business manager, Bob Benedict, who told you that ATP was CASI's only source of funding.

Let's turn now to how the defendant spent all that money. I said how the defendant spent all that money, because as you heard from the business managers Lee Gurfein and Bob Benedict, the defendant was the only person who had signing authority. And as you can see for yourself in the checks, D. B. Karron was the only one who actually signed checks.

When Judge Patterson instructs you on the law later, I expect you will learn that to satisfy the requirement of the statute, the amount of misapplication the government would need to prove is $5,000 and more. So let's take a look at government exhibit 114 and see what happened to the money in year one.

As Ms. Riley explained to you, the chart to the left shows the break down by budget categories, according to the approved budget, how the money is supposed to be spent. The chart to the right shows what actually happened, what actually happened to the money. Remember, all the government needs to prove is $5,000 in misapplied funds. Forget about everything else in this chart for now, just look at the rent. Rent alone was $60,000, 12 times, 12 times, ladies and gentlemen, above

the $5,000 threshold.

You heard a lot of testimony about rent. Hope Snowden testified that you couldn't use research money to pay rent, period. It doesn't matter whether you used the condo in part as an office. It doesn't matter that ATP is the only project the company is working on; no means no. And that's because the ATP project is to fund high risk scientific research, not overhead expenses that every business has to pay. And the defendant tried to get rent approved, using different justifications, but he was explicitly told no, time and time and time again. And the defendant didn't just hear it from the NIST people. The defendant got the same no answer from his two business managers, Lee Gerfein and Bob Benedict, who contacted NIST at the defendant's request, got the same no answer and told the defendant no. The defendant got the same no answer from his bookkeeper Frank Spring. Despite all these no answers, we all know what happened. The defendant said he could do whatever he wanted. He said the people at NIST loved him. He went ahead and he did it anyway.

Ladies and gentlemen, the government could stop right here and meet the $5,000 threshold required by the statute, but we didn't stop there because the crime the defendant committed got worse, much worse. Once the defendant decided to cheat, he decided to go all out. After all, why limit yourself to rent. Utilities are sort of like rent, right. You can't work or live

in a place without electricity or air conditioning, right. So let's use grant money to pay for that too. And that's exactly what he did, over $16,000 in utilities in year one alone. But wait. Why limit to represent and utilities? After all, you can't live or work in a place that's too messy, right, so let's hire a cleaning lady and to do some dusting and wiping and have taxpayers pay for that too. And that's exactly what he did, cleaning over $5,000 in year one. Why stop there? After all, you can't work if you're hungry, right. So let's throw in meals for good measure, and have Uncle Sam pay for that too. Close to $2,000 in year one alone.

Now, you remember Mr. Rubinstein asking Ms. Riley questions about meals. He showed her receipts of meals that Dr. Karron had with handwritten notation on the back showing that he ate with other people. You remember that. Well, so what. Does anyone seriously think that you can go to IHop as defendant did, and have taxpayers pick up the tab because you claim you talked about the project over pancakes? There's no line item in approved budget for meals, so you can't pay for meals with grant money, period. It is that simple.

But no, defense counsel said it's not so simple because there's this category called others that maybe you can fit it in. Well, guess what? This is not a game to see who could come up with the cleverest argument to see whether you could make something fit. There are rules. There are written

budgets. And so let's go to government exhibit 10B, page seven. This is the proposed budget the defendant himself submitted that NIST later approved. You can see what others is referring to. It's referring to audits, not meals; audits, that's it. And so no, the defendant couldn't go to a restaurant, claim he was talking about the project over dinner and have the federal government pay for it. Instead, he needed to pay for it himself from his own salary, just like everybody else in New York City who doesn't get a federal grant.

Before I leave government exhibit 114, let me just make one more point. Remember when Ms. Riley was up on the stand. Mr. Rubinstein spent a good part of the morning cross-examining her about her audit finding about Lee Gerfein's salary. Remember that? Mr. Rubinstein kept asking Ms. Riley why she disallowed 25 percent of Mr. Gerfein's salary, when the approved budget -- it was made clear that Mr. Gerfein could split his time 75 on the project, 25 on everything else? And Mr. Rubinstein kept pushing and pushing to try Ms. Riley to admit that she made a mistake in her audit. And Ms. Riley tried to explain how she didn't make a mistake that had something to do with tax withholding and the difference between expected and actual salary; you remember all that? But you know what, ladies and gentlemen, at the end of the day, none of that matters. As you can see on this chart, when Ms. Riley did her analysis using the bank records as opposed to her audits,

which were based on the company's books and records, she gave the defendant every benefit of the doubt. Look at this yourself. Under the budget for other employees salary, let's go back to the last page. For other employees salary budgeted for $450,000, not a single cent of other employees salary was disallowed. In fact, according to government Exhibit 114, the company was actually under budget under the category of other employees salaries. For equipment, Mr. Rubinstein also asked Ms. Riley about whether she examined every piece of equipment that CASI bought. Remember all that? Again, Ms. Riley gave the defendant every benefit of the doubt. Again, in this analysis, Ms. Riley wasn't even second guessing whether defendant bought the equipment related to his research for equipment. The only amount that she disallowed was the amount over budget, that's it.

So what is the end result of the defendant's conduct? Even giving him the benefit of the doubt? Over $268,000 in misapplied funds in year one alone. Make no mistake, this is taxpayers money, because as you saw in the purple charts just now, the ATP program was the only source of funding in CASI's business accounts in year one.

And in year two, defendant didn't get through the whole year because he got shut down, but he blew away over $196,000 in just nine months, spending money on the same items that he was told time and again he could not spend grant money

on; things like rent, utilities, cleaning lady, and meals.

Now that we've walked through the numbers, let's turn to the defendant's intent. I expect Judge Patterson will instruct you later that to find the defendant guilty you need to find that he intentionally misapplied the grant money; in other words, that the defendant's conduct wasn't simply the result of a mistake or misunderstanding. So what is the evidence to show you that the defendant knew full well what he did was wrong? Let's start from the beginning where the defendant hired Mr. Lee Gerfein as his business manager. Mr. Gerfein told you that when he was first hired, the defendant agreed to an arrangement where each check over $250 would have to be co-signed by himself, Mr. Gerfein, and Dr. Karron. That was the understanding Mr. Gerfein had when he got job. Then what happened? Within a week the grant money came in, the defendant wrote this letter, Government exhibit 21, page three, taking the signing authority away from Mr. Gerfein. Now, ladies and gentlemen, why did the defendant do that? It's simple. The defendant did that because he wanted exclusive control of the grant money. Stripping Lee Gerfein of his signing authority was necessary because defendant was already planning to use money for his own benefit. One week into the program, and the defendant was already thinking ahead. In fact, the defendant made no secret of this at the time. Mr. Gerfein told you that when the grant money came in, Dr.

Karron transferred $75,000 into his own account to pay off family and credit card debt that he had been racking up from every day living expenses. Mr. Gerfein testified that he told the defendant he couldn't do that, he couldn't spend grant money this way. The defendant said he had to do it, he had to pay the bills. And Mr. Gerfein, after he had been stripped of his signing authority, couldn't stop him because this was already a done deal.

What else shows you the defendant knew full well what he did was wrong? Let's focus on rent again, because it's such a big item. Time and again, people told him he couldn't use grant money to pay rent, no matter what. The grant people, Ms. Lide, Ms. Snowden, told him no at the kickoff meeting, they told him no in telephone and in person conversations. Defendant's own employees told him no. Dr. Karron asked Lee Gerfein to call the grant on his behalf. And when Mr. Gerfein got the no answer, he relayed that information back to the defendant. And Bob Benedict even before he was hired, told the defendant no, and he kept telling the defendant no after he came on board to CASI.

After all these conversations, does anyone believe for a minute that the defendant didn't know he couldn't use grant money to pay rent? Of course not.

But what clinches the case against the defendant on his intent is the defendant's own statements. Look now at

government Exhibit 213. This is an e-mail you saw a few days ago from Dr. Karron to someone named Tia Lorraine, dated December 18th, 2002. Reading from the fourth line of the bottom of the page, let's zoom that in.

"I will make a lease with Windy and make like I only keep a folding bed on 33rd Street. If ATP buys into this idea, then I can charge my rent on the apartment to the grant and pay my mortgage."

There's no mistaking the defendant's intent here. He told a friend he would "make like" that he keeps a folding bed on 33rd Street and he was hoping that ATP would "buy into this idea." This e-mail is devastating proof of the defendant's intent in his own words. But if you need more proof of the defendant's criminal intent, take a look at these items; a blender, a GPS tracking device, digital camera, a box of drills, a dust buster.

Now, ladies and gentlemen, these may not be the most expensive items in the world, but can anyone seriously think that these items are related to the defendant's research on surgery and computer imaging? These items he bought just show you his mind set. They tell you that, when the defendant said he could do whatever he wanted, that he could just schmooze with people and take them out to lunch and everything would be okay, he meant every word he said. But there's more. When year one was over and the auditor was beginning to look at the

books, what did the defendant do? Frank Spring told you what the defendant did, the defendant changed the books. You saw those e-mails. Mr. Spring asked defendant to stop mucking about in the books, and stop recharacterizing expenses as related to the grant when they really weren't. And what happened? The defendant kept changing the books. Is that the behavior of someone who has no clue what he did was wrong? Of course not. Common sense tells you that's the behavior of someone who knew what he did was wrong and was doing his mighty best to hide it as best he could.

Ladies and gentlemen, make no mistake, this isn't a case about a misunderstanding. This isn't a case about someone getting caught up in some compact grant rules and forgot to dot the I's or cross the T's. This is a simple case about the defendant, a Ph.D. scientist, willfully cheating the government with his eyes wide open.

When you apply your common sense to the evidence presented before you, and when you listen closely to Judge Patterson's instructions on the law, there's one and only one conclusion that's supported by the evidence and the law, and that is a verdict of guilty on the count that's charged in the indictment. Thank you.

THE COURT: All right. Mr. Rubinstein.

MR. RUBINSTEIN: Could I step out for a minute Judge? Could I have a personal moment? Thank you.

THE COURT: All right. Does the jury need a break? Anyone of you need a break? All right.

(Continued on next page.)

MR. RUBINSTEIN: May I proceed, your Honor?

THE COURT: Yes. Go ahead.

MR. RUBINSTEIN: If the Court pleases, people of the prosecution, Dr. Karron and my associate you never met, William DiSento, madam forelady, ladies and gentlemen of the jury, this is my opportunity to share with you what I believe that the evidence showed.

Now, let me say at the outset that it's your recollection that controls. You have been sitting here watching the witnesses, observing the exhibits that are in evidence. I have been concentrating on my examination of the witnesses, and if I misspeak as to what any particular witness may have said, it's your recollection that controls, not mine.

If there is a question amongst you as to what a particular witness said, you have the right to come back and ask for the transcript to be given to you or read to you by the court reporter, whatever the system is that Judge Patterson may have. But you get the exact words that were said. And I will attempt to be as accurate as humanly possible.

What is the purpose of summation? The purpose of summation is for each party to give the jury their sense of what the evidence shows and what inferences can fairly and reasonably be drawn.

Now, after I finish speaking, the prosecutor has an opportunity to rebut. He can sit there with a pad, write down

notes and give you answers to what I have raised in this summation. And everybody in life likes to have the last word, but the reality is that you folks have the last word, because you collectively and individually could answer their arguments for Dr. Karron that I'm not able to because I don't have a chance to talk again.

As a matter of fact, no matter how hard I may prepare, there is no way in the world that I am going to come and give you all the arguments there are or even the best arguments.

You folks have a fantastic opportunity as jurors. The second highest calling in this country next to war time service is sitting on a criminal jury, judging a fellow human being. This is a high calling. It's what distinguishes our society from many others, because you stand between justice and injustice. Every place has a prosecutor, but not many places have jurors who come and sit and deliberate.

Now, you may notice that when you come into this courtroom and when you leave this courtroom we all rise for you, and we do the same when Judge Patterson comes in, because that is the reverance and the respect that we have for each and every one of you as jurors.

You are the sole and exclusive judges of the facts. They can't tell you what the facts are. I can't tell you what the facts are. You tell me what the facts are.

I can talk about the evidence. I can talk about the

lack of evidence. I can talk about burdens, but you are the sole triers of the facts. You decide what you believe, what you accept, what you don't believe, what you question. That is your role.

The judge, he is the judge of the law, the sole and exclusive judge of the law. I as a lawyer have a right to disagree with him respectfully, but I tell you one thing about Judge Patterson that you know by now: Nobody respects jurors more than he does. Getting in on time, keeping his commitment to you of ending a case, that's the way he functions, because he understands what a high duty you have and what a service you are performing.

Now, when you come into this courthouse and you are going towards the elevators you have seen the Lady of Justice with her scales out there. And it's interesting that our foreperson is a lady. And what is she? She is blindfolded; she is not blind. She is blindfolded. The reason that she is blindfolded is that she has the scales, she wants to treat everybody fairly regardless of your background, or how you look, or how you act, whether you are a bowery bum or a person of high standing. And then she puts on those scales of evidence and then she sees, she feels because she is blindfolded. But she can see -- she is not blind. She is only blindfolded -- whether or not the burden has been met by the government, whether or not they have proved their case beyond a

reasonable doubt.

We're here because there was an indictment filed against Dr. Karron. You heard how many years they were investigating him. The judge will tell you the indictment is no evidence of guilt. Dr. Karron came into this court and he said I am not guilty, I didn't do anything wrong in this case, and I challenge the government to prove me guilty beyond a reasonable doubt. And I submit to you that the judge is going to charge you with what a reasonable doubt is, but each one of you could have a different reasonable doubt, whether or not you feel that the prosecution hasn't brought enough evidence before you, whether or not they're asking you to be speculative, whether or not you think that some of their witnesses weren't credible that you would rely upon in the ordinary course of life. Each one could have one reasonable doubt.

If any of the 12 of you have a reasonable doubt -- you don't have to agree on the same reasonable doubt -- you have to vote not guilty, because our system after Dr. Karron pled not guilty, our system presumes him innocent, and as you sit here now and as you enter the jury room you have to start out saying I presume him innocent, I presume that he did not intend to intentionally misappropriate any funds and he did not intend to commit a crime by spending grant money on purchases.

In fact, when he spent money, he spent money with the intent that the ATP project that he was working on would

succeed and he would be successful, because I think it's fair to say that a scientist loves doing what they do and they love science.

The government wants you to presume Dr. Karron to be guilty. They show you a GPS system -- this is his piggy bank -- he bought a GPS system so he could use it in his car for personal use. Did anybody testify that he used the GPS system to drive around Manhattan? Did anybody bring any evidence to you that he needed a GPS system for his daily life?

Where did they find the GPS system? Not in the car. They found it in the apartment. What does that tell you? He uses it when he goes on a trip. Where does he go on trips? He goes to Washington D.C. on a grant.

Do they come and they take the GPS system and check it out and see where the last destination is? These GPS systems, they're electronic, and you can find out where he went if he set his course.

Have any of you ever gone to Washington D.C. and got lost on the beltway and couldn't find your way around? No, they want you to speculate and assume he used the GPS system for an improper purpose. They don't want to show you anything.

They talk about a camera. A camera. They have the arrogance to suggest to you that he used the camera for his personal use. Show us the pictures. It's a digital camera.

No, here is the camera, you don't use a camera. Why

don't you use a camera if you are a scientist? Maybe something breaks on the machine, on one of the computers, and you take a digital picture of it and you e-mail it out to the manufacturer and he tells you how to fix it. Or you take pictures of the people working in the labs so that when you make presentations -- you know he went all over making presentations about this ATP grant. Why can't he use the camera? If he was a dentist, he could have a camera. No, he can't have a camera, that's for his personal use.

Did they show you pictures of Dr. Karron on his bike with Windy Farnsworth riding around Manhattan? No. No. But they want you to speculate. They want to suggest to you that either it's not in the budget, or if it's in the budget it's unrelated to the grant. Where did they show you that anything was unrelated to the grant except for speculation and smiles?

You know, they talk about these ATP rules as if they were the Ten Commandments. These are broad rules. You don't go to jail because you don't follow some grant rules. What kind of country would this be if those were the rules? You think they had a big sign like where they have the no smoking sign and they have the circle and the thing, violate any of these rules you go directly to jail? This is a question of people having disagreements on what is allowed and what is not allowed. That's what it is.

And does Dr. Karron have the right to disagree with

people that work for him or disagree with people in ATP? Does he have a right to disagree and say that I think that these expenses are allowable? Or is he compelled to be like the prosecutor, say these are the rules, you break one rule you go directly to jail?

Where does the evidence come from? They talk about Riley's work. Remember, Riley's work was created after they closed the grant down. I cross examined her. When did you prepare this; it says 2008 on it? She says, no, no, no, I did it before; this is just a redone.

So, after they closed the grant down, they go and look, how do we justify what we did? And now we're going to take every piece of paper you have, and we're going to show you that you spent your money wrong.

Well, it reminds me of an old story in jolly old England when there were lords and barrons and bishops, and this baron was riding through the forest, and he noticed that on a number of trees there was an arrow, and there was a circle drawn around the arrow, a bulls-eye, and he was really impressed. So he called his knights in, and he said I want you to find that archer, I want to make him the knight of archery of my fiefdom. And they went and they scoured the forest and they found this fellow who was the archer. The barron invited everybody in the area to come and see his new knight of archery perform. There were hundreds of people, and the archer, they

put out a target, a hundred yards, 200 yards, the archer fires, misses the target by a mile. He tries again, misses again. They now move the target in, he still can't hit the target.

Now, the barron is pretty embarrassed by this showing, so he says to the archer, before I behead you tell me that you are not the man who fired those arrows that were in those trees. He said, I am, sire. He said, well, how were you able to hit all of those bulls-eyes? He says, sir, I stood on the edge of the forest, I fired my arrows into the air, and wherever they landed I drew a circle around it.

And that's what they did here. They have no bulls-eyes. They don't have one. They put an exhibit up during summation; they don't check anything out. It is absolutely amazing, they check nothing out. Dr. Karron ate at IHOP. Wow, check your American Express bill, see if IHOP is in Virginia, right near Washington D.C., where he goes on business to visit the grant people in Maryland and Virginia and Washington D.C.

Ask yourself -- and I say to you the arrows are the intent here -- whether or not he intended to do anything wrong. Are they kidding, you can't go on a meal? Do you think that Riley paid for her own lunch? The government paid for her own lunch when she went out with Dr. Karron, Hayes and Benedict. Who do you think paid for her lunch? She came in from Atlanta. You don't think she gets reimbursed for her lunch? You don't

think people have a right in business if they have a business lunch to deduct it?

Riley even deducted the lunch she went to. She deducted the cost of the lunch she went to with Dr. Karron, Benedict and Hayes. And she disallowed his lunch and every other meal for that matter.

I guess the old Brooklyn expression "you throw enough against the wall, something is going to stick" is what this case is all about.

The prosecution started this case in 2003. When did they speak to the witnesses? Did the prosecutors in this case speak to one witness before April or May of 2008? It's a simple case. We got the GPS, we have different things, we've got roach killer.

So, I submit to you respectfully that you can't use suspicion -- as they have -- or speculation to convict somebody. Dr. Karron did not use the NIST ATP money as his own piggy bank.

The question is even if it's nonallowable, at the end of the day does that equal criminality?

Remember, there was a whole audit process, an entire audit process where they had this agreement resolution that was never afforded to Dr. Karron. In other words, under the system if after Riley does her audit, you then can appeal the audit to the ATP NIST people to see whether or not they are going to

allow those expenses. They never had that process. So, you don't know as you sit there now -- and you can't speculate I submit to you -- whether or not ATP would have approved it.

I think sadly -- and I'm going to get into this with Benedict -- that they probably would have been forced not to go along with it for reasons that I will talk about.

Also, you know, it's interesting, the government said in their opening on page 39, "Finally, you will be seeing a number of documents that will show you the fraud in clear black and white, and in particular you will see an analysis of the defendant's personal bank account and bank accounts at CASI."

Do you remember when I cross-examined Riley? She never saw the defendant's personal bank account, she never looked at his personal bank account. She didn't give a darn about his personal bank account because she was looking to put circles around arrows. So, she has this chart that they put up on the board, Government Exhibit 115, and she has no contributions. And when does she find any contributions? In 2004, after the grant is stopped and she is looking over.

By the way, Ms. Riley from the OIG, what credit cards of Dr. Karron's did you happen to look at? His American Express card.

And of course you disallowed everything on his American Express card that he used for business.

Basically.

What about his Mastercard?

Well, I never looked at his Mastercard. I never saw his Mastercard. I didn't ask for his Mastercard. I didn't look for his personal accounts, I didn't look for his Mastercard.

The defense put in the Mastercard, and when you look at the Mastercard you are going to find that on the Mastercard statement in October of 2001, March of 2003, you are going to see Datavision, the same thing you see on the American Express. In other words, he is spending his own money on grant-related items with his own credit card. That's what he's doing. All right? And you are going to see that in a number of different areas. You are going to see that -- you will see all the restaurants that he went to and charged to his Mastercard. Does this show you he is a man that is attempting to keep his business expenses separate and apart from his personal expenses? Do they have expenses every day on his American Express that he was eating out and charging it to the government? No.

You know from the evidence that he has backup in his computers of every single thing he ever spent. And we showed you the receipts just as an illustration of the lunch that he had with Riley. And he signed it, and he signed it, and Benedict signed it, and it's in evidence for you. Because he was attempting to do everything honest. He did everything he

could. But they draw the circle, IHOP, Starbucks. Were they there when things were discussed? Did they care enough to get the backup to his expenses? No.

So we brought you Ms. Farnsworth. Just to show you an illustration, imagine this. I think this is 125. They see something. They finally did some investigation. They saw -- when they grabbed everything in Dr. Karron's apartment, I think it was in 2006 the testimony is, they cleaned out his apartment, they found this. Well, it must have been everything he has. Everything he has, everything he owns must have been bought with ATP money, so we will take everything including the shoe rack.

Then they find in their arrow search, wow, we found a shoe rack in this statement, and that must be the shoe rack. I submit to you that it's not the shoe rack, and you have more than a reasonable doubt about that. And I submit to you that the other thing that was charged was something about ten, something with a rack. Do you know if Mason used that as material to do construction there? Do you know what it was used for? They didn't find it there. Why didn't they find the shoe rack that they had on the bill? Because it was used for something grant related.

What is wrong with having flashlights? You know these computers, you heard about them, they come out, they go behind. This is in 2001 and 2002. Computers are a lot smaller now.

And of course computers that Dr. Karron created were big things, and so you have flashlights. All of a sudden that's a problem.

Big screen. Do you remember there was all that talk about Government's 120-A? He has a big screen in the room that's used as the CASI headquarters. In the picture you will see a big screen.

And a projector. They have a projector, you know, like this. And they have a screen like that. And he paid grant money so that he can make presentations to people of what their project is and what they're doing. And of course the prosecution wants you to believe that that's not deductible, that's not allowable.

They also suggest he had too many computers. Who are they to tell Dr. Karron what he needs to accomplish what the government gave him $2 million over three years?

One thing you know. There wasn't one kick-back that Dr. Karron got from buying anything. He didn't sell anything that he bought so that he could stick some money in his pocket. He had no intention of doing anything wrong.

And do you know what the blender was used for? And let's say it wasn't used for grant purposes, so he made a mistake. In their world you can't make a mistake.

How about the fact that Mason testified he did work in the apartment, and they want you to think that they improved

the value of that apartment. That apartment should have been worth close to $700,000. It was sold for what, $510,000, because of all the changes that he made in the apartment. If one wanted to buy it and move it, it had to be ripped out because it wasn't suitable for somebody to live in.

And what did Mason tell you? Oh, I did some work in the kitchen.

Oh, you did work in the kitchen? What did you do in the kitchen?

I fixed a cabinet.

Did you get paid for that?

Yes, I did.

Well, I will show you this check, Mr. Mason. Is this the check you got? Is this a CASI check?

No.

This is a personal check from Dr. Karron, because it's a personal expense. So the man with the piggy bank is going into his own pocket to pay for things that he understands are not allowable under the grant and are personal in nature. That's what we have here.

And who are we talking about? We are talking about Dr. Karron, a man who goes to a meeting, an ATP meeting where he is eventually going to get a grant, and he stands up and says is there anybody here that can help me? Because I am bad with finances and I don't know how to do this stuff. You know?

This is the guy that they're drawing circles around what he is doing.

And did he destroy one record? One record? No. What is their complaint? Springs testified he went into the computer and he changed something. What did he change? He changed whether or not it should be allowable or not. He didn't change an invoice. He didn't change what was marked on the check.

Anybody except for Riley could look at the checks. Imagine an auditor never looked at the checks, never did a bank reconciliation to decide what he spent.

Every check you saw had a memo on it. You heard Dr. Karron wouldn't sign a check unless he had backup to it, there was an invoice. All of that was in the computer. Is this a guy looking to do something wrong?

They make this broad brush, he changed something therefore he must have changed it to do wrong. No, it's arguable. He doesn't have to agree with his accountant. He doesn't have to agree with his business manager. He doesn't even have to agree with the grant people. At the end of the day, if they tell him it's not allowable, he has to pay the money back. That's the system. That's the system.

This man hid nothing. How do you steal when you don't hide anything and you make a note of everything you do, and you never ask anybody else to do anything wrong to hide anything

because it's all out there? Every checking account he has a different color check. He posted the records originally. Then he hired people to do that, to scan the stuff in.

And in their opening they suggested that he did something that was improper in filing the records. And you found out when I cross-examined Springs and in one of his e-mails about what's called an audit trail. You can go back into the computer if you want to prove guilt beyond a reasonable doubt and show what person made what change, and then argue from that that they had guilty knowledge or a guilty mind.

Don't argue -- I have too much respect for your common sense to think you won't credit it. The bottom line is how can you argue and have testimony he changed something without knowing what he changed? How could you say that? There is no evidence at all. The man had backup; he had audit trails.

I submit to you that the e-mails are the DNA in this case, and they will prove, as I said in my opening, that Dr. Karron is innocent.

The government is going to argue, and they have argued, that without prior approval he misapplied the funds. And I submit to you that the evidence is otherwise.

The third element is during a one-year period the defendant intentionally misapplied money. I submit to you he had the tacit authority from the grant to revise any expense

that he had, that this grant permits and it's understood that you could change things as long as you are doing it for the purpose of succeeding on the project.

If you have a reasonable doubt whether or not that was implied by everybody that Dr. Karron met, look at this 10 percent rule. He can move $80,000 anyplace he wants in that budget as long as he doesn't go over the $800,000 for the year.

Element four provides that the money was intentionally misapplied. I submit to you that no money was intentionally misapplied, because you knew and you heard a lot of testimony about budget revisions, budget amendments and what have you. And the fact -- even if the findings on the audit were accurate -- which I submit they were not -- by Riley, it still would not become criminal because there was no intent to do anything wrong in misapplying the funds.

Now, this is not IBM. They do not have an HR department. This is a ma and pa science company, and it was run that way with a lot of inefficiencies in the finances but not in the science. And apparently the people at ATP NIST were more interested in the science than in the finances.

And I have been wondering, wondering for a long time now why are we all here, how did this case get so out of control. Well, what you learned at this trial is that ATP doesn't exist anymore. The project that had $60 million -- which to you and I is enough money for me to buy a couple of

lotto tickets every week in the hope of acquiring it -- in the world of government this is not a lot of money, it's not a lot of money. But who gets the $60 million? Two thirds of the grants are given to people like Dr. Karron, who need start-up money. They don't have money like IBM got a grant for $2 million; they also got a grant for $50 million, but put that on the side.

And there is something that smells here, it really smells bad. And I could be dead wrong, and if I am, and if you don't feel this way, you reject it. I hope you will credit some of the other things that I present to you.

The government wanted to get rid of this project -- I'm not talking about the prosecutors here. They get the case from other agencies -- they didn't like the idea of $40 million going to little guys. Why not give it all to the IBMs and the Halliburtons of this world? Hey, we found Dan Karron. Who better than this guy, who is a cook but he is no crook? And that's what happened here. And now we look at him and we speculate what he did.

And I submit to you that when you evaluate all of the evidence, and you see his payroll checks which I put into evidence as P-1 through P-6, where his total amount for the year is about $35,000. Ask yourself, he gets $175,000, how does he only have $35,000? Because he took an advance of 75,000 to begin with that's not reflected in a check because he

didn't get a check for that $75,000, it was a wire transfer. He wired it into an account, into his CASI account the evidence is, and so, therefore, he got net $110,000. And that's where his money was. And he commingled, and there was no rules he couldn't comingle. He put the NIST money with his own money, with his CASI money. Oh, CASI had no other business, but they got $110,000 cash for this man. Can't they spend it any way they want?

And then, yeah, whenever the bank balance -- if you go through all the bank balances you will see that whenever they get low, who comes up with money? Dr. Karron. When there is no money at all around, whose credit card is used? Dr. Karron. Oh, he is a bad guy. You know, we set up this whole system, and we told him he can only sign checks, he can't spend any money without approval. And we had this PayPal system in effect. And what does Dr. Karron do? And these are in Government Exhibit 110, I believe, they have the PayPal records. Obviously up until March 1, '03 Benedict is not there, so he has one, two, three, four transactions in PayPal, the largest of which is $476.55. He bought 12 items of something that's in PayPal, in other words $40 an item, he spent $13.20, $168.16 and $283 for every item, $168 is for 11 items.

Do you think that things were happening at CASI related to the project that he needed to do something quick to

get a couple of dollars? Oh, he violated, he doesn't listen to anybody, he doesn't do anything, he is arrogant.

I grew up in Bronxville, Brooklyn, and my dad worked for the IRS, and he used to say, son, don't make a federal case out of this. You know, my father was a smart man. I didn't know what he was talking about, but I sure have learned.

Your job, your job is to evaluate the evidence, to evaluate the witnesses who come before you. And the one thing the defense has -- the only thing they have -- is the right of cross-examination. It's like a prod. Somebody says something, and you prod them a little bit to see whether or not what they say makes sense, whether or not they have backup for it, whether or not it's believable beyond a reasonable doubt.

I don't stand up here and tell you who lied about what or said what. I leave that to your evaluation. All right? You take the direct, you take the cross-examination. And the beautiful thing in our system of justice is that we have a right to defend our clients vigorously in this great country, and I hope to god that none of you ever need that kind of vigorous defense. And next to Dr. Karron, the person I feel sorriest for in this whole case is Bob Benedict.

You have to ask yourself, how does that happen? How does this happen? Here is from all you can see about the man's background a truly decent guy. He volunteered to help Dr. Karron from day one in this project for nothing. He came

onboard for $60 an hour, which you can figure out is a hell of a lot less than Gurfein was getting. Sure.

And this is a letter, this is an e-mail that's in evidence as Defendant's U, and this is I submit to you part of the DNA that I am talking about. And this is a letter, an e-mail he sends to Dr. Karron on April 19, 2004, and the grant is stopped since June. He is out of the loop since about August or September or October, and you can just imagine how this thing is killing him, what happened at CASI and that the grant was stopped. And he says, "RE: Specific instances of Hope Snowden ignoring requests, or not providing documentation for understandings, Joan's bungling upsetting Hope; Joan making certain Hope acknowledged all errors as due to Dr. K." He goes on. That was the subject.

"As you know, one of my first acts was to assist in the submission of the CASI response to the multi page questionnaire tossed at CASI. This response included a budget amendment along with a request to have me acknowledged as your administrator.

"Hope ignored both requests. We never received any acknowledgment, verbal or in writing, that our response/amendment request would or would not be approved. As such, I was never approved as the administrator and Hope would not answer or return my calls. I was a "nonparticipant" and therefore someone to be ignored.

"The fact that I had eight years experience with ATP projects, as an administrator, without any audit problems, and a litany of ATP references, which Hope never bothered to check, didn't appear to be viewed as a positive addition to the project.

"The rare communications we did receive were addressed to Dr. Karron or Peter Ross, ignoring the fact that ATP was informed Peter was no longer involved.

"It was VERY FRUSTRATING and apparently in direct opposition to what would have been in the best interests of both CASI and NIST.

"Ms. Snowden appeared to be a bureaucrat, totally disinterested in the success of the project and only interested in whether CASI dotted all the Is and crossed all the Ts, associated with her rigid understanding of the ATP and other relevant federal guidelines. She consistently ignored CASI attempts to provide service which would help the project and her in the meantime. She believed CASI was out of control from the beginning and the number of personal changes and amendment requests proved her right, in her mind. There was no weight given to the possibility that changes were driven by Dr. K's lack of ATP experience or assistance offered to help Dr. Karron grapple with the ATP quagmire.

"ATP is as responsible for the state of the CASI project as anyone.

"Sorry, but that's the best recollection I can muster."

How does this man who wrote this letter come here and testify before you the way he did? Ask yourself that. How does he come here and initially say he knew nothing about Dr. Karron advancing after the grant was suspended in June, June 27, '03, that he knew nothing about Dr. Karron advancing money? How could he say that? I showed him an e-mail where he said that Dr. Karron had put $47,000 in, 47K and that there was 21K in cofunding. He denied that we ever had any equipment issue under cofunding. How does that happen to a guy that you look at, who in October, who in 2004, said just the opposite of what was going on than what he said on the stand?

I really think at the end of the day Dr. Karron is going to get a call one day from Bob Benedict apologizing. Here is a man who worked for IBM for over 20 years. You heard from our character witness, these people get humongous pensions. They got stock probably when IBM was worth ten cents and probably their shares are probably worth a million dollars a share that they have. How does a man like this turn against Dr. Karron this way and get embraced by the prosecution?

Well, you know, this is the last thing I will say to you about my dad. I told you he worked for the IRS. I once got him, through a friend of mine who managed a Ford dealership, a car. I got a call from this friend of mine and

he is all upset. I said, what's the matter? He says, your father. I said, what do you mean? He says, I got back from lunch, a Mr. Rubinstein from IRS called; I almost lost my lunch. It was my father, he was having problems with the brake light.

Well, when the prosecution shows up at your door and you are the guy who submitted documents, all of a sudden you get yourself on the team, and it's tragic. He tells you -- here is a responsible businessman -- oh, I have a CASI e-mail but I never accessed it, I never look at the e-mails at CASI, you see, I have a different e-mail.

Well, when my wife and I are on vacation, she gets her e-mails from the house where we are. I mean who doesn't look at their e-mails? People are anal about this stuff. You mean you are the manager, the business manager of CASI, and you are not accessing your e-mails, that maybe you have e-mails in your other account wherever you are? Please, please.

Now, the judge is going to tell you that witnesses are available to both sides. And you can find -- the difference is that the government has the power to give immunity to people, they can make deals with people, they can do a whole lot of things. And of course they have the burden of proof beyond a reasonable doubt. So, you could say that if they would have called this witness, and if we would have credited this witness, we would not have a reasonable doubt, because in this

case Joan Hayes, who we only heard the name but never saw, is not a person whose testimony is cumulative.

The government relied on Joan Hayes throughout this entire case, and you never got an opportunity to see her, and we never got an opportunity to ask her questions.

You know it's interesting, Benedict and Hayes, makes you think of Benedict Arnold, right? Here is the person who is your accountant, who inappropriately becomes your auditor because people tell you you can't wear two hats.

Do you remember Benedict? I asked him, did you ever see Hayes' audit? Remember, she was supposed to submit the audit. She got a 90-day extension in October of 2002. You are supposed to submit the audit. She got a 90-day extension until December 31, 2002 for the first year, and in August of 2003 Bob Benedict hasn't seen the audit and Dr. Karron hasn't seen the audit. Wow. You know who saw the audit? Riley, Hope Snowden. They saw the audit. And the testimony is in the record, Riley saw the audited before she went to make the personal visit, the site visit. Before she closed the project down she used Joan Hayes' numbers.

Where are those numbers? I asked Riley, do you have any numbers? Do you have any audit sheets? Do you have any general ledgers showing us how you base this?

No. No, I used Joan Hayes'.

Well, where are they? What did she give you? What

was her motivation, Hayes's motivation? She clearly poisoned everybody at ATP against Dr. Karron.

Could you imagine, they have a man, Dr. Karron, who they know is not a business manager, and he gets a guy like Benedict to be his business manager and they won't approve him. They leave Dr. Karron without a business manager from the time that Peter Ross leaves until I think the date on the e-mail was in early March, that Benedict comes aboard, and they won't approve him. Why won't they approve him? Why won't they approve a revised budget? Why won't they do anything? Why are they stonewalling this? Ask yourself: Who came in the middle of the night to talk to them? Same people that came and took everything including the shoe rack out of Dr. Karron's house.

THE COURT: You're a little over 45 minutes.

MR. RUBINSTEIN: Halfway there, Judge, but thank you.

Who wrote the books? Whose books were they that they used? She and Frank Spring created whatever books there were. What did they submit?

THE DEFENDANT: Excuse me. I have to go to the bathroom. Do I have your permission, sir?

MR. RUBINSTEIN: Judge, I will keep going.

THE COURT: Somebody was saying something.

MR. RUBINSTEIN: Yes, Dr. Karron needs a personal moment, but I will keep going.

THE COURT: Do you want to break now?

MR. RUBINSTEIN: Only if the jury does, Judge. I have no problem with excusing him on the record.

THE COURT: You said another 45 minutes.

If he needs a break, let's take a very short break. The jury is excused for a short break.

(Jury not present)

MR. RUBINSTEIN: We might as well step out ourselves, if you don't mind, Judge.

THE COURT: Well, all right, but come right back. I have to have some time for the charge. Leave me a little time, Mr. Rubinstein.

(Recess)

THE COURT: All right. Let's bring the jury in.

I hope you won't be too much longer, Mr. Rubinstein.

MR. RUBINSTEIN: I'm trying not to.

THE COURT: Because I have a rebuttal, then I have to have a little room for my charge, and we've got to have lunch.

(Continued on next page)

THE COURT: All right, please be seated.

Mr. Rubinstein.

MR. RUBINSTEIN: Thank you, your Honor.

Hayes is -- a letter in evidence, government exhibit 51. This is after she's cooperated with the government from God knows when. I submitted figures that she created to get this grant suspended. 51, she writes a letter, or Dr. Karron writes a letter to Hayes, so she's still in communication with Dr. Karron, even though you know from e-mails --

MR. KWOK: Objection, not in evidence.

MR. RUBINSTEIN: Oh, I'm sorry. Okay.

THE COURT: Exhibit 51 is not in evidence.

MR. RUBINSTEIN: It's in their book.

So I submit to you that, that you have a lack of evidence just on the absence of Hayes.

And you know from the testimony that Benedict had no idea that Hayes had given the audit report to Riley prior to the meeting. Imagine, she went to the meeting in June and was -- in June they had the meeting. Riley came to the site visit and Benedict, Hayes and Dr. Karron were present -- that's the lunch that is in evidence. And she stayed aboard, because she kept feeding, feeding numbers to Benedict, not to Dr. Karron. Dr. Karron's a scientist. You know, he didn't create these numbers. And we know that Benedict kept giving numbers -- I mean Hayes kept giving numbers because we have

those amended financial status reports that were filed August 13, 2003. And Benedict tells you where he got those numbers from. And you also know that Benedict was paid -- that Dr. Karron paid after the grant was suspended -- he's not supposed to, but he wants -- he wants the project to work. So he's paying expenses. He puts -- you know about $47,000 in cash that he refinanced -- it's in the e-mails -- he refinanced his apartment, put the money into the grant to keep the grant going. Is that -- does that sound like somebody who is looking to intentionally misappropriate funds? This is a high risk, innovative technology that he's working on that requires changes as you go along. Everybody tells you. And mistakes in science, I submit to you, are merely experiments that didn't work out. Those are mistakes. So you keep changing things. You need more workers. So he gets volunteers. You heard about all the people that are in the apartment. He gets students. What are all these people doing there? They're all working on a project. Does anybody suggest that he's not working on a project every minute that he has?

And you know that the mantra of ATP is, it's your business, your money, do whatever you want and we'll back you up because we're interested in science here. But then the bean counters come in and they start drawing circles around every number to suggest you're doing something wrong. And that's what we have here. Imagine leaving this company without a

business manager.

Now, you know that the grant is a fungible thing, because exhibits four -- do we have that exhibit? I think it's page 11. It tells you you could seek a revision at the end of the year. Not the end of the year of the grant, which is October -- in this case September 30th, 2002, but at the end of the year. And all of these revisions that were submitted by Ross and what have you, related to 2001. In other words, you're allowed to go backwards. You don't need approval before. You know, for every rule that they have, if you look through these books, you're going to find a rule that says the opposite. And they expect people to read a couple of hundred pages of information. Somebody's giving you a check for $800,000, you sign on the bottom line and you're not worrying about the details. You know you're not going to do anything wrong. Do you read everything that the credit card company sends you? They send you these things about changes in your credit card stuff. Got to make an admission, I don't.

Do you have that?

MR. DiCENZO: No.

MR. RUBINSTEIN: All right, we'll find it and put it up later.

Now, so that's what Dr. Karron understood. He understood that he could have the grant changed and he could have the lines changed. And why wouldn't he? Doesn't it make

a heck of a lot of sense to you people? But no, they disallow Winter's salary. Winter worked in the office. Not only disallowed her salary, they also disallowed she got child care. They didn't like that. So you don't have salary, you're not entitled to fringe benefits, and also you shouldn't have child care anyhow. Who are they to say what fringe benefits your company should give you? Who are they? They tell you, oh, you should have a -- something in place. You need a written manual. Why do you need a written manual for? Nobody's going to look at it. Nobody's going look at it. They don't review the written manual. You don't have to submit it. Nobody asked for the manual. You're allowed to make fringe benefits.

But we do have a written manual. And who created it? Bob Benedict. He created it. We put it in evidence. And the government gets up on redirect and says, well, wasn't that July 2nd after the grant was suspended? What do you think, he made that document on July 2nd; he start working on it on July 1st and he stayed up all night? Come on. You have e-mails back in August of '02 relating to this lawyer Miller, who is apparently on the board of CASI, asking about documenting it. But the reality is in this grant, where nothing's written in stone, if you do what's reasonable and you did it before, you know you're not going to have any trouble.

But then you get an auditor -- I mean I leave to it you. You judge the witnesses. Riley. She disallows part of

Dr. Karron's salary. She disallows it. He didn't spend 100 percent of time on the grant. Well, what if he spent 80 hours a week? If he spent an hour, two hours on something else, afterward, those 80 hours, uh-uh. Let me ask you; ATP approved $175,000 for Dr. Karron. Did they expect him to get a $175,000 in salary? Of course they did. They didn't expect the bean counter to come along and say you're not allowed to take the whole 175. And that would've been resolved in an audit resolution.

Then we talked about Mr. Gurfein. Gurfein got $100,000, net -- I'm sorry, gross salary. So, well, 25 percent of his time wasn't spent on ATP, so we took off 35 percent. So I showed her the exhibit H. And did she ever answer it? She gave you double talk that you haven't heard since you heard comedians that could double talk.

The amended budget that's approved, which is part of -- which is the defendant's H, it shows Gurfein gets a 133,333, he devotes 75 percent of his time, and that equals out mathematically to $100,000. Well, no, it's 75 percent of a hundred. Well, no no. She's getting 133. What's 75 percent of 133? They say numbers don't lie.

You have witnesses like Hope Snowden. She tells you about she discussed the $75,000 that Dr. Karron took as an advance, with Agent Garrison. And when I cross-examined her, I showed you that the first time, and she conceded it, that she

ever spoke to anybody about the $75,000 advance, was on September 8th, 2003. And I confronted her with Government's exhibit 3504A and she agreed with that. All right. So whatever reason, she was stonewalling Benedict and the revision provisions. Government worker, and she's taking the government line. All right.

Now, I asked her about these preaudit, pre-grant costs, and she said you do that at your own risk. So, does Dr. Karron -- so can you get ATP to agree to let you use your preaudit spending -- pre-grant spending, the money you spent before October 1st, 2001, and you can take that as an allowable expense; is that something you could consider?

Now, but she wants you to think that she's, she's on top of what's going on. Nobody cared what was going on, as long as science -- remember they had visits? They had site visits, and Lide told you, yeah, they were progressing on the science. That's what they cared about at ATP. That's what they should have cared about. They should have cared about that.

Now, the mantra was, no good project goes unfunded.

THE COURT: An hour and 15 minutes.

MR. RUBINSTEIN: Pardon, Judge? That's not so. We started at 45. I cannot possibly have talked a half an hour. You're putting in the recess on me, Judge. That's not --

THE COURT: I am --

MR. RUBINSTEIN: That's not fair at all. I didn't want a recess.

THE COURT: No, I know. I haven't stopped you yet. I'm just giving you a, just giving your time line --

MR. RUBINSTEIN: All right.

THE COURT: -- so you know where you are.

MR. RUBINSTEIN: Judge, you know I love you, but I got to go, I got to go.

In exhibit 10B in evidence, this is what it says, this is on the budget that is part of what you submit. They say: We -- this is government talking -- we recognize that unexpected events occurred frequently in R&D, research and defendant projects, and that budgets may be needed to be changed as the project proceeds. Okay. That's all you have to know about the budget. It's not written in stone. It's a living breathing thing. And if you look at Exhibit 4, page 11 -- it's not in your book -- it says, you can revise the budget at the end of the year. And that's what he did, and you can give 10 percent anyway you want.

Now, the smoking gun, rent. The smoking gun in this case. When was the rent paid for? CASI collected rent. Dr. Karron collected rent from CASI since 1995. There's no evidence that CASI was not paying rent, and that Dr. Karron wasn't showing it on his income tax returns for the whole time of the grant.

You know that there was a period where he didn't have work and the rent went unpaid so that he was owed the rent. If he owed a bank loan and he took money and paid off a bank loan that he owed before the grant, what would they be saying? So we have this issue of rent. He feels, he feels that he should be able to collect rent from ATP. Why? His is a unique situation. He only has one project. They called direct and indirect costs. He says everything is direct, because I have only one project. These other places have more than one project so they can't say how much of the rent is the project. So let's follow it. And everybody is telling him, everybody's saying you can't do it, you can't do it. He keeps trying, he keeps trying, he keeps trying.

Finally, near the end of 2002 it dawns on him, he's not getting the rent. Now, a decent accountant then reapplies all whatever he spent for the rent that they adjusted. That's what the accountant does, they go into your credit card, your this, your that, they decide what is attributable to you and what isn't, what is personal.

He now has this brilliant idea. He's a bright guy; I am going to move out of the apartment, I'm going to move to Connecticut to my friend Windy's house, I'm going to pay her rent and then I'm not using the apartment for my house and I could deduct it. Great idea. So he goes, he makes a contract with Windy. He gives her 2,000 in advance. He's all set to do

it, when they realize this is ridiculous. I'm going to be going up and back from Connecticut. Probably realize, you know, if I use my GPS going up and back from Connecticut it may not be a business expense, you know, it may not be allowable. So he decides not to move into Windy's. And what does he do? What does he do, ladies and gentlemen? He doesn't take rent any more. There are no checks for rent in 2003, not in this grant. So once it finally went through his head that you can't do it, it's not allowable, this arrogant guy, according to them, listens to nobody, stopped taking rent.

Now, you're going to look at the credit cards, you're going to look at the Master Card. You're going to see how often he had meals, where they were, what places. You know that he took Lide and Jane Orthwein to lunch at Benjamin's. You see he goes to Benjamin's other times. You'll see these restaurants and what have you. All right.

You're going to consider the audit, or the lack of audit. I submit to you that 110, Government's 110 and 111, which were created long after the grant was suspended, after they made the final report, after they made the final report in March of 2004, then she went and audited it. Then she created records to justify what she had done before. There was probably about 45 checks in this whole reconciliation that they never did. So ask yourself, are you going to rely upon any of the numbers that Riley created.

Now, I'm going to skip a whole bunch of stuff. I'm going to go to August 13, 2003. And August 13th, 2003 -- oh, by the way, rent and utilities are not permitted. They're indirect costs. You know from the testimony in this case that CASI was approved to take off, to deduct utilities, a portion of the utilities. Because you'll see the e-mails and you'll see that in the exhibits they were allowed to take off electric $7600, right. Why? Because it's an indirect cost. Well, how did you get it? Because it's negotiable. They submitted the bills showing that the increase in electricity, due to the equipment, showed a rise to the extent that they felt the grant people felt that Dr. Karron was entitled to reimbursement for on his. When you look at the book and you'll see that October 19th, 2002 was the last rent payment made to Dr. Karron, okay. $2,000. And only one rent payment was out of NIST. And I submit to you that they had authorized fringe benefits. They were authorized 110,000. Who is the person that is permitted to tell you, after you've been authorized to spend 110,000 and you can't spend 110,000? Who? And they deduct your payroll tax -- they deducted your -- reduce your salary so now you couldn't take your payroll taxes. You got a salary. So now they come up with a figure of $547,000 which is -- that's criminal.

Now, I want to get, because I -- did anybody say that these medical expenses weren't deductible? No. Their argument

is well -- or weren't legitimate? No. Their argument is that they -- there was no plan in place. And I submit to you they didn't need a plan. They had a plan. That's the way they did it. That's the way they always did it. And that even Benedict said that you can use the matching costs, you could use your own equipment. And there's no question that Dr. Karron had equipment in his place when he started this grant.

But I want to go, because I told you, to August 13th because I'm -- of '03, and this is the setting. Bob Benedict, these are -- there are exhibits in evidence Government's 40 40A, 41, 41A, 42, 42A, 43, 43A. These are the financial reports, quarterlies. Remember, they had to submit quarterly reports. And low and be hold on August 13th, 2003 after the grant is suspended, Bob Benedict prepares these amended financial reports. Whose figures does he use? Obviously Joan Hayes. He suggests that Dr. Karron saw these, approved them and what have you. I'm going to prove to you, beyond any doubt, that that's not true, just not true. A, you're going to see from the Master Card expense records in evidence, as defendant's ZZZ-1 that -- where you're going to find that all kinds of medical benefits were paid on behalf of Dr. Karron. And you're also going to find that all kinds of equipment, including to Elliott -- I'm sorry -- Elliott Medical Group, you're going to see Dr. Brants, you're going to see Kips Bay Optical, all of this is paid on the Master Card. Should he get

credit for that? I submit he should under his medical benefits plan.

You're going to find, when you look at the Master Card bill, that on August 13th, 2003, Dr. Karron was in Canada. You're going to see medical bills paid for on August 13th, 2003 that were incurred on that day that he was in Canada, because you give a credit card, they put the date, they put the place, and so he's in Canada.

How do these, that he's supposed to be this criminal, this master mind criminal, fudging and making records, and what have you -- let me show you -- give me 48, and give me -- I'm going to show you -- could you put this up, please? This is 48. Now, I submit to you, on the bottom of that is a signature. That's not a handwritten signature when you take a look at the document. That's a printout signature. It's not Dr. Karron's. And you see on the bottom of the exhibit --

THE COURT: The bottom line?

MR. RUBINSTEIN: Yeah, bottom line. You see it says "revised". See it's dated. Can you see from where you are, August 13th, 2003? Whose initials are next to revised? I submit to you if you take a look at exhibit 48 in evidence, Bob Benedict signature, that Benedict submitted those forms, okay. And it makes sense. It makes sense. You think that Dr. Karron is checking out these numbers and doing those things? I submit to you that this is a case put together with no substance; that

Dr. Karron had absolute right, not beyond a reasonable doubt, beyond any doubt, to expect that these expenses that he was charging would be accepted, because he was working his butt off for this grant. He was trying to succeed, because that's who he is. He was trying to develop something. And I don't want sympathy. I don't want sympathy that it was a great project and maybe we all would've benefited from it. I don't want sympathy from that. I want justice. I want justice. And I want you to look at this case as a scientist working, and you see the hours on the e-mails, day or night. If you look at the credit card statements and you see where he is and different states and what have you, and say whether or not this was his thought. His thought was to keep -- I submit to you we proved to you his thought was to keep the thing going, to keep it going even after they told him it was suspended, to keep it going. Why did he put money in after it was suspended? Are they going to argue to you that he did that as a cover up; that he thought that if he put money in, that this is going to solve his problem because he's involved in this criminality beforehand? Is that what they're going to stand up here? I submit I rely upon you to answer that argument for me. He believed all along that this grant would be restored, and somehow if he owed money, he would pay the money back if he was mistaken. He didn't have a problem with that at the end of the day. He thought he was right. Maybe he was wrong. So he put

money in. He kept people working, and he spent money on the grant. And his problem was that he believed the people around him. He believed in Hayes. He believed that she was on his side, and that the numbers that he was getting were correct numbers.

Now, the bottom line is the grant has never been terminated; right? They have no evidence of termination. Suspended. And the Judge is right, I could talk for another two hours. And I probably, when I sit down or when I go to sleep tonight and wake up, I could think of some of the most significant things I could think of to share with you people. But the reality is that you sat here, paid attention. You know the evidence, you know your duty. I have -- being a criminal defense lawyer is an awesome responsibility. And you have -- I've done all I could, okay. He came here, he pled not guilty. We'll wait here for you folks to come back and say he's not guilty. And I thank you, and I could still say good morning, so have a good morning.

THE COURT: Thank you, Mr. Rubinstein.

MR. RUBINSTEIN: Thank you, Judge.

THE COURT: All right. Are you ready to proceed, Mr. Everdell?

MR. EVERDELL: Yes, your Honor.

Ladies and gentlemen, every case in federal court is important, but not every case in federal court is close. This

is not a close case. The evidence that you've heard over the last week has been clear, that the defendant misspent grant money, and he spent the money on things that he knew, things that he was specifically told he couldn't spend the money on. And what's even more outrageous is that the defendant spent money that was supposed to go for scientific research to help us all, money that other scientists who didn't get this grant could have used to make wonderful life changing discoveries. So the defendant didn't just cheat the government, he cheated all of us.

Now, the defense counsel in his closing remarks tried to take your eye off the ball in this case. He tried to make you focus on a number of things that are not really at the heart of this case. He wants you to speculate about witnesses you didn't even hear from. He wants you to wonder about what, whether the defendant was in Canada in 2003, after the grant was even suspended. These are not the things that are at the heart of this case. So in the next few minutes I want to take a step back and I want to focus briefly again on how the evidence shows the defendant intentionally misspent the grant funds, and then I'm going to focus a little bit about some of the arguments the defense counsel made in his closing remarks, and see why none of it is borne out by the evidence.

Now, first, let me just reiterate one point to you, ladies and gentlemen. The government bears the burden of proof

at all times. The defendant doesn't have to say anything or do anything to prove his innocence. But you are entitled to examine the case they put on and the arguments defense counsel made, to see whether or not they make any sense.

So with that, let's first take a step back and look at just a few examples of the evidence before you of the defendant's guilt.

Let's take a look at regs. This is a big item in the case. There can be no doubt that the defendant was told, repeatedly, by several different people that no matter what the situation may be, you cannot use ATP funds to pay for rent. The defendant heard it from Hope Snowden, who told him this right after the grant was awarded. He heard it from B. J. Lide, another of the grant administrators. He heard it from his own business manager, Lee Gurfein, who himself had heard it from Hope Snowden, in a phone call repeatedly. He heard it from Frank Spring, the bookkeeper he hired in connection with the first year audit, and he heard it from Robert Benedict, his second year book manager, business manager. Indeed it seems like the only person for whom this was not completely evident was the defendant. And why is that? It's not because the rule wasn't crystal clear. It was. It was because the defendant simply refused to listen to what he didn't want to hear. Remember what Robert Benedict told you about how --remember what Robert Benedict told you about how the defendant operated.

He would go from person to person asking the same question again and again until he got the answer he liked. Well, in this case the defendant never got the answer he wanted and he went ahead and he did it anyway.

Remember what Lee Gurfein told you, he thought -- he told you that the defendant thought that everyone at NIST loved him and that he could do anything he wanted with the money. That's exactly what happened here. This did not happen because the defendant didn't understand the rules or make an honest mistake. This happened because the defendant refused to understand what all parents tell there five-year-old kids when they stomp their feet and hold their breath when they don't get what they want, and that means no means no.

And in the end the evidence clearly showed the defendant intentionally misspent $60,000 on rent in the first year of the grant alone.

Now, defense counsel got up and he talked to you about rent. What did he say to you about rent? He said the defendant felt entitled to it. And that's exactly the problem, he felt entitled to it. He was told he couldn't do it, and he did it anyway. And he says, it finally dawned on him in 2002 that he couldn't use ATP funds to pay for rent? It finally dawned on him in 2002? That's not what the evidence showed. He was told in 2001 repeatedly by many different people. How could it possibly finally dawn on him in 2002 that you can't

use these funds to pay for rent? How is that possible? It's because he's deliberately ignoring everything that people are telling him. This is deliberate ignorance on the part of the defendant. He does not deserve some kind of special congratulations because he stopped paying rent to himself in 2003, after the grant was suspended.

MR. RUBINSTEIN: Objection. It wasn't after, it was before.

THE COURT: Objection sustained to that.

MR. EVERDELL: And of course there were the utilities.

THE COURT: I think the evidence -- my recollection -- the jury's recollection will govern is that it was in December of 2002 before the grant was suspended in June 2003.

MR. EVERDELL: And there were the utilities as well. Again, the defendant was told repeatedly by multiple people, you can't use ATP funds to pay for utilities. Again, he chose not to listen and he spent $16,000 on utilities in year one alone.

And, finally, there were several charges the defendant incurred that were not only in the budget, not -- excuse me -- not in the budget, but that no one could possibly think were legitimate research expenses. Over $5,000 in the first year of the grant alone for his cleaning lady, Margaret Ferrand. Defendant counsel didn't comment at all on that in his closing statements for his cleaning lady. The checks themselves on the

memo line say cleaning. How is that possible that anyone could understand that that's a grant related expense? The rules were clear. You got --

MR. RUBINSTEIN: Objection, your Honor. There's evidence that she scanned, she did other things -- their own documents.

THE COURT: Objection overruled. It's argument.

MR. EVERDELL: And there are a hundred dollars on meals and personal items like the blender and the dust buster. I mean take a look at these items, ladies and gentlemen. Are there anything -- does anyone believe these are for scientific purposes?

We've talked a lot about -- defense counsel talked a lot about the GPS tracking device, and where he went with it. He may have gone to D.C., but the issue is not where he went with it. The issue is what money he used to pay for it. This is not an approved expense. And by the way, if you look at the luggage tag that it's on it, this was used in a flight August 13th, '05, well after the grant was suspended. This is a personal item. He's not using this for grant stuff. We're not saying that you can't have a digital camera. We're not saying you can't have a GPS device or a blender or dust buster. Simply saying that you can't use grant funds to pay for it. And that's evidence, that is evidence and it was evident to the defendant. And these items just go to show that the defendant

was reckless with the taxpayer money and was using it to pay for his daily personal expenses. Remember what Lee Gerfein told you. He testified that during the grant proposal writing process, he saw what he believed to be the defendant living off his credit cards because he had no other money. Well, once the ATP funds became available, the defendant did exactly the same thing with the ATP money, he cut himself $75,000 and used it to pay his personal debts.

And let's not forget the evidence clearly showed that all these funds were being spent with ATP funds. CASI had no other money. That's what the bank statements that Belinda Riley talked about show, and that's what both CASI business manager Lee Gurfein and Robert Benedict told you, there was no other money.

So now that we have a clear picture of what's at the heart of this case, let me address some of the arguments defense counsel raised in his closing remarks. Now, first one of the things that he mentioned, that he raised was that the government is trying to put the defendant in jail just because he violated some grant rules; how could he possibly master hundreds of pages of rules and thick regulations; nobody could possibly do that. Well, that's not what we're saying. Of course it's not necessary for the defendant to have an encyclopedic knowledge of the Code of Federal Regulations and the ATP grant rules. That was Hope Snowden's job. However, it

was the defendant's obligation to listen to what Hope Snowden told him and what others told him about what he could and couldn't do under those regulation. And that's what he didn't do.

The defendant chose to disregard that advice, and in fact not only did he not listen to Hope Snowden, but he did not listen to the people that he specifically hired to help him in these areas; his business managers, his bookkeepers. That is not trying his best to comply. That is not an innocent misunderstanding. That is conscious flouting of the rules. And it doesn't take a Ph.D. to be able to listen and understand what everyone around you is telling you.

Now, he thought I suppose, defense counsel commented that he thought he was free to disagree, he was free to disagree if he wanted. Well, if I entrust you with my money and I tell you that you can't spend it in certain ways, you can't do X and you can't do Y, then you don't have the freedom to disagree with me. You have to spend it how I tell you you can spend it. The disagreement is not an issue. He was told what he could and couldn't do. Just take a look at rent, utilities, and he did it anyway.

Defense counsel also commented that, well, the defendant was bad with finances, right. He's an incompetent manager; we can't hold him responsible for that, we certainly can't send him to jail for that. Well, we agree that the

defendant was an incompetent manager, but that doesn't get him off the hook. You heard testimony that he was a hands on manager. He hired people to run the finances and keep the books straight, but then wouldn't let them do their jobs. Now if you're a defendant, if you're a defendant and you're such an incompetent manager, you're bad with finances and all you really want to focus on is the science and not bother with all the boring business stuff, wouldn't you hire people to do it for you and then let them do what they needed to do so that you could get on with your research? Of course you would. That's not what he did, though. He didn't. He wanted to keep control of the books.

You heard testimony that Lee Gurfein, first year business manager, was stripped of his authority to sign checks by the defendant. Why? Because the defendant wanted to keep control of the books and the check writing, because he wanted to spend the money the way he wanted to spend the money, and he didn't want any interference with that. That's not someone who just want to focus on the science and leave all the business stuff to somebody else. That's someone who wants to be right in the middle of things. And there's a reason why he did, he wanted to keep control of the money for himself. And when he saw things he didn't like, he would muck around in the books he changed entries and meddle in areas that people knew better than he did. Why did he do this? Because he thought he knew

better, and he thought he could do what he wanted and he thought he'd get away with it.

Defense counsel also said something about how there was tacit authority from grant to revise any of the costs he wanted at any time. Well, where is the evidence of that? Did you hear that from Hope Snowden that he could just negotiate any time you want? No. No. There is no evidence of that. You are allowed to amend your budget during the grant year and for years that happen or still to come. We heard that, yes. But you're not allowed to amend your budget for years that are already over. Hope Snowden told you that, and so did Robert Benedict. And if you look at page 11 of Exhibit 4, the defense counsel mentioned, that's what they were testifying about. That year is already over. That money is already spent. You can't unring that bell.

And there are rules. It's not all one big negotiation. You heard from Hope Snowden that she told the defendant, the budget is the Bible; you got to get everything in writing, you got to get it approved if you're going to make significant changes. That was crystal clear. It's not all one wash, big negotiation. That's not how this works.

Now, after defense counsel had commented about how we're supposed to interpret the defendant's actions, he also took some shots at the witnesses. And he took a shot at NIST and tried to make it seem like it's their fault that this all

happened, right. You recall him talking about NIST, and they must have had something against the defendant that they were out to get him and they wanted to end this project. Well, what evidence is that of that? You heard --

MR. RUBINSTEIN: I didn't say that. I didn't say it was NIST.

THE COURT: Objection.

MR. RUBINSTEIN: Mischaracterization.

THE COURT: Objection sustained, Mr --

MR. RUBINSTEIN: People over there.

THE COURT: Objection overruled, Mr. Rubinstein. This is argument, and they can remember what you said.

MR. EVERDELL: Defense counsel said they were picking on his client, Dr. Karron. You saw exactly why this grant got suspended. It's because they saw so many different numbers coming at them in such quick succession that they thought something really bad was going on there with their funds, they were getting misspent, in a really bad way. And that's why it would happen. They got these budget revisions all within weeks of each other. All the numbers were different for year one even after year one was over. That raised red flags, and rightfully so. That's what the problem was. And then they called in the auditors and there was a problem, low and be hold. And that's why the grant got suspended, it's because he was misspending the money. We weren't out to get him. They

just want to make sure our taxpayer dollars are being spent for what it's supposed to be spent for, for research, and it wasn't.

And they tried, defense counsel tried to take some attacks on the witnesses, about Hope Snowden. Tried to make her look like she was just some bureaucrat, rigid understanding of the rules. And she was not out to help him. Well, you met Hope Snowden, all right. You remember her testimony. Hope, evaluate for yourselves what kind of person she is. She told you that she was always willing to receive and answer questions and receive calls. And she did that on numerous occasions for the defendant and for Lee Gurfein.

Now the fact she didn't always say yes to them doesn't make her a rigid bureaucrat. It makes her good at her job. It means that she's trying to make sure that the money is spent for what it's supposed to be spent for. Okay. And Hope Snowden explained to you, by the way, why she couldn't talk to Robert Benedict or why Robert Benedict wasn't approved as the business manage for the second year. It's because he was part -- that letter asking for his authorization to be the business manager, was part of one of those many requested budget revisions that never got approved because the numbers were so messed up. So yes, you may have seen an e-mail from Bob Benedict where he may have expressed frustration by the fact that he wasn't hearing from Hope Snowden and that things

weren't moving along, but Hope Snowden explained to you why that happened. It's because she couldn't do anything without the proper authorization. That's why he never got approved. It was part of the budget that never got approved. That's why that all happened.

Now, defendant also talked to you about Joan Hayes, where was Joan Hayes. Well, that's -- he's trying to suggest the government is trying to hide something from you by not calling Joan Hayes. Well, that's simply not the case. Ladies and gentlemen, you sat here for over a week, and patiently attentatively heard the testimony in this case. Did you really need to hear from another auditor? You have the analysis done by Belinda Riley, and that analysis does not rely on CASI's books and records, which were always in flux. Her analysis is based -- Belinda Riley's analysis is based on the bank records and checks and American Express cards and invoices. Those are all fixed. And her analysis traces out the expenditures to the last penny. And, by the way, Belinda Riley's analysis, when the defendant tried to poke some holes in it, he tried to say he didn't -- she didn't take into account his personal bank account. Well, his personal bank records. Well, look at Government's Exhibit 111 when you go back to the jury room. That's Belinda Riley's analysis of his personal bank records. And the Master Card payments that he talked about so much are there, page 16 of 27. She took those into account.

But it doesn't matter about the personal statements. The personal statements are not the grant money. The grant money, we heard, was all housed in the CASI accounts. It's irrelevant what happens with the personal bank records and the Master Card records of the defendant. We're talking here about what happened to the ATP money, the grant money, that was in the CASI accounts. That's the analysis in Government's exhibit 110. That's what you need to focus on. Feel free to check it yourself.

Defense counsel also tried to argue to you that the defendant should be given some credit because he tried to pay some money back, he tried to get the grant restarted. Ladies and gentlemen, if you misspend money and then decide to pay it back later, you still misspent the money. You can't unring that bell. It doesn't change that. This was intentional. He knew what he was doing and he knew it was wrong. He didn't believe the people around him. He disregarded them at every turn.

And defense counsel's also suggested that you should consider the fact that some of the things that he did, like the, quote unquote, improvement to his apartment actually decreased the value of his apartment, right, so that what he did for the company was not personally benefiting him, right. But you're going to hear, when Judge Patterson instructs you on the law -- it's for him to instruct you on the law, not me --

but I anticipate that you're going to learn that whether or not the misapplied money benefited CASI in any way is irrelevant. The fact that certain expenses may or may not have benefited CASI does not give the defendant a free pass under the law.

Now make no mistake, ladies and gentlemen, this case is not about someone who tried his best to comply with the rules and innocently misunderstood what was expected of him. This is a case about someone who is told by several people on multiple occasions what he could and could not do with the grant funds, and who deliberately ignored what he didn't want to hear. This is a case about someone who is so convinced that he could get his way because he was so loved by the people at NIST, that he didn't have to follow the rules, and that he could do whatever he wanted with the grant money. And as a result of his attitude, the defendant willfully disregarded everyone around him and misspent the taxpayers money clearly on unauthorized expenses like rent and utilities and personal items, cleaning ladies, blenders, dust busters, other things, things that couldn't possibly be related to research, and all because he thought the rules did not apply to him. Well, the defendant was wrong. That's not how this works. He can't do whatever he wants, and it's time to hold had him accountable. When I gave the opening statement a few days ago, I told you that if you pay close attention to the evidence and follow the Judge's instructions and use your common sense, you will arrive

at the one verdict that will be consistent with the law and the evidence at the end of this case, and now all the evidence is in. The case now rests in your hands. And I submit to you that the government has kept its promise to you and has proven this case, beyond a reasonable doubt, and the only verdict that is now consistent with the law and the evidence is a verdict of guilty for Daniel Karron. Thank you.

THE COURT: Well, it's -- thank you, Mr. Everdell.

It's now 12:20 and lunch is scheduled for 1:00. I think I can -- the charge is not short, but it'll probably run past 1:00, because I don't read a particularly fast charge. I think that you want to be able to absorb what I say as I say it, and for that reason I read relatively slowly. But I'll try and do the best I can if you're all ready to go now. If anyone needs a break, let me know. All right? Then, I'll proceed.

Members of the jury, we're now at that stage of the trial where you will soon undertake your final function as jurors. I know you will try the issues that have been presented to you according to the oath which you have taken as jurors, and which you promised that you will well and truly try the issues in this case and render a true verdict. If you follow that oath and try the issues without fear or prejudice or bias or sympathy, you will arrive at a true and just verdict.

The fact that the prosecution is brought in the name

of the United States of America entitles the government to know greater consideration than that accorded to any other party to a litigation. By the same token, it is entitled to no less consideration. All parties, whether government or individuals, stand as equals at the bar of justice.

You have now heard all the evidence in the case, as well as the final arguments of the lawyers for the parties.

My duty at this point is to instruct you as to the law. It is your duty to accept these instructions of law and apply them to the facts as you will determine them, just as it has been my duty to preside over the trial and decide what testimony and evidence is relevant under the law for your consideration.

On these legal matters, you must take the law as I give it to you. If any attorney has stated a legal principle different from any that I state to you in my instructions, it is my instructions that you must follow.

You should not single out any instruction as alone stating the law, but you should consider my instructions as a whole when you retire to deliberate in the jury room.

You should not, any of you, be concerned about the wisdom of any rule that I state. Regardless of any opinion that you may have to what the law may be or ought to be, it would violate your sworn duty to base a verdict upon any other view of the law than that which I give you.

Now, after listening to my instructions about the law, you will then determine how this case should be decided.

As I've said, the members of the jury are the sole and exclusive judges of the facts. You decide based upon the weight of the evidence; you determine the credibility of the witnesses; you resolve such conflicts as there may be in the testimony, and you draw whatever reasonable inferences you decide to draw from the facts as you will determine them.

In determining the facts, you must rely upon your own recollection of the evidence. What the lawyers have said in their opening statements and in their closing arguments and their objections or in their questions is not evidence. In this connection, you should bear in mind that a question put to a witness is never evidence. It is only the answer which is evidence. Questions are relevant only to the extent that they enable you to understand the answer. Nor is anything I may have said during the trial or summations, or may say during these instructions with respect to a fact matter to be taken in substitution for your own independent recollection. What I say is not evidence.

The evidence before you consists of the answers given by the witnesses, the sworn testimony that they gave from the stand, as you recall it, and the exhibits that were received in evidence.

You've heard evidence in the form of stipulations that

contain facts that were agreed to be true. You must accept the facts in those stipulations as true.

The evidence does not include questions. Only the answers are evidence. But you may not consider any answer that I directed you to disregard or that I directed struck from the record. Do not consider such answers.

Since you are the sole and exclusive judges of the facts, I have not meant and I do not mean by my words or acts to indicate any opinion as to the facts or what your verdict should be. The rulings that I have made during the trial are not any indication of my views of what your decision should be as to whether or not the guilt of the defendant has been proven beyond a reasonable doubt.

I also ask you to draw no inference from the fact that upon occasion I asked questions of certain witnesses. These questions were only intended for clarification or to expedite matters, and certainly were not intended to suggest any opinions on my part as to the verdict you should render or whether any other witnesses may have been more credible than any other witness. You are expressly to understand that the Court has no opinion as to the verdict you should render in this case.

As to the facts, ladies and gentlemen, you are the exclusive judges. You have the responsibility of reviewing the evidence, of weighing the credibility of the witnesses,

separating the important from the unimportant, making the factual determinations which bear on the guilt or lack of guilt of the defendant. You are to perform the duty of finding the facts without bias or prejudice as to any party.

It is the duty of the attorney for each side of a case to object when the other side offers testimony or other evidence which the attorney believes is not properly admissible. Counsel also have the right and duty to ask the Court to make rulings of law and request conferences in the robing room or at the sidebar out of the hearing of the jury.

All those questions of law must be decided by me, the Court. You should not show any prejudice against any attorney or his or her client because the attorney objected to the admissibility of evidence, asked for a conference out of the hearing of the jury or asked the Court for a ruling on the law.

(Continued on next page)

THE COURT: As I have already indicated, my rulings on the admissibility of evidence do not indicate any opinion about the weight or effect of such evidence. You are the sole judges of the credibility of all witnesses and the weight and effect of all the evidence.

Now, there are two types of evidence which you may properly use in deciding whether a defendant is guilty or not guilty.

One type of evidence is called direct evidence. Direct evidence is a witness's testimony as to what he saw, heard or observed. In other words, when a witness testifies about what is known to him of his own knowledge by virtue of his own senses -- what he sees, feels, touches or hears -- that is called direct evidence.

Circumstantial evidence is evidence which tends to prove one fact by proof of other facts. There is a simple example of circumstantial evidence which is often used in this courthouse.

Assume that a witness testified that when he came into the courthouse this morning, the sun was shining and it was a nice day.

Assume he testified that someone walked into the courtroom with an umbrella which was dripping wet, and that somebody else walked in with a raincoat which was also dripping wet.

Now, he does not testify that he looked out of the courtroom and saw that it was raining. So there is no direct evidence of that fact. But on the combination of facts which I have asked you to assume, it would be reasonable and logical -- if you found the witness's testimony to be credible -- for you to conclude that between the time he testified and the time those people walked in, it had started to rain.

That is all there is to circumstantial evidence. You infer on the basis of reason and experience and common sense from an established fact the existence or the nonexistence of some other fact.

Many facts, such as a person's state of mind, can rarely be proved by direct evidence.

Circumstantial evidence is of no less value than direct evidence; it is a general rule that the law makes no distinction between direct and circumstantial evidence, but simply requires that before convicting the defendant, the jury must be satisfied that the government has proved the defendant's guilt beyond a reasonable doubt after review of all of the evidence in the case, direct and circumstantial.

During the trial you may have heard the attorneys use the term "inference" and in their arguments they have asked you to infer, on the basis of your reason, experience and common sense, from one or more established facts the existence of some other fact.

An inference is not a suspicion or a guess. It is a reasoned, logical decision to conclude that a disputed fact exists on the basis of another fact that you know exists.

There are times when different inferences may be drawn from facts whether by direct or circumstantial evidence. The government may ask you to draw one set of inferences, while the defense may ask you to draw another. It is for you and you alone to decide what inferences you will draw.

The process of drawing inferences from facts in evidence is not a matter of guesswork or speculation. An inference is a deduction or a conclusion which you, the jury, are permitted to draw -- but not required to draw -- from the facts which you find to be proven by either direct or circumstantial evidence. In drawing an inference, you should exercise your common sense.

So while you are considering the evidence presented to you, you are permitted to draw, from the facts which you find to be proven, such reasonable inferences as would be justified in the light of your experience.

Here, again, let me remind you that whether based upon direct or circumstantial evidence, or upon logical or reasonable inferences drawn from such evidence, you must be satisfied of the guilt of the defendant beyond a reasonable doubt before you may convict.

Now, how do you evaluate the credibility or

believability of the witnesses? You have had an opportunity to observe all of the witnesses. It is now your job to decide how believable each witness was in his or her testimony. You are the sole judges of the credibility of each witness and of the importance of his or her testimony.

It must be clear to you by now that you are being called upon to resolve various factual issues under the indictment, in the face of very different pictures painted by the government and the defense which cannot be reconciled. You will now have to decide where the truth lies, and an important part of that decision will involve making judgments about the testimony of the witnesses you have listened to and observed. In making those judgments, you should carefully scrutinize all of the testimony of each witness, the circumstances under which each witness testified, and any other matter in evidence which may help you to decide the truth and the importance of each witness's testimony.

Your decision on whether or not to believe a witness may depend on how the witness impressed you. Was the witness candid, frank and forthright? Or, did the witness seem as if he or she was hiding something, or being evasive or suspect in some way? How did the way the witness testified on direct examination compare with how the witness testified on cross-examination? Was the witness consistent in his or her testimony or did he or she contradict himself or herself? Did

the witness appear to know what he or she was talking about and did the witness strike you as someone who was trying to report his or her knowledge accurately?

How much you choose to believe a witness may be influenced by the witness's bias. Does the witness have a relationship with the government or the defendant which may affect how he or she testified? Does the witness have some incentive, loyalty or motive that might cause him or her to shade the truth? Or does the witness have some bias, prejudice, or hostility that may have caused the witness -- consciously or not -- to give you something other than a completely accurate account of the facts he or she testified to?

Even if the witness was impartial, you should consider whether the witness had an opportunity to observe the facts he or she testified about, and you should also consider the witness's ability to express himself or herself. Ask yourselves whether the witness's recollection of the facts stands up in the light of all other evidence.

In other words, what you must try to do in deciding credibility is to size a person up in light of his or her demeanor, the explanations given, and in light of all the other evidence in the case, just as you would do in any important matter where you are trying to decide if a person is truthful, straightforward, and accurate in his or her recollection. In

deciding the question of credibility, remember that you should use your common sense, your good judgment, and your experience.

Now, in evaluating the credibility of the witnesses, you should take into account any evidence that the witness who testified may benefit in some way from the outcome of this case. Such an interest in the outcome creates a motive to testify falsely and may sway the witness to testify in a way that advances his or her own interests. Therefore, if you find that any witness whose testimony you are considering may have an interest in the outcome of this trial, then you should bear that factor in mind when evaluating the credibility of his or her testimony and accept it with great care.

Can I speak to counsel a minute?

(Continued on next page)

(At the sidebar)

THE COURT: I noticed that there is no expert witness instruction in here. It occurred to me that you both might want it.

MR. KWOK: That's correct. We do have expert witness. The government would request an instruction.

MR. RUBINSTEIN: I'm not requesting an instruction, your Honor.

THE COURT: Do you object?

MR. RUBINSTEIN: No, I think that would be obstructionist.

THE COURT: I will ask my clerk to just bring me down one, an instruction on expert witnesses.

(Continued on next page)

(In open court)

THE COURT: I'm going to go right ahead.

You have heard the testimony of government employees. The fact that a witness may be a government employee does not mean that his or her testimony is necessarily deserving of more consideration or greater weight than that of an ordinary witness. Also it does not mean that his or her testimony is necessarily deserving of less consideration or less weight than that of an ordinary witness.

It is your decision, after reviewing all the evidence, whether to accept the testimony of the government employee and to give that testimony whatever weight, if any, you find it deserves.

The defendant has pleaded not guilty to the charges in the indictment.

As a result of the defendant's pleas of not guilty, the burden is on the prosecution to prove the defendant is guilty beyond a reasonable doubt. This burden never shifts to the defendant for the simple reason that the law never imposes upon the defendant in a criminal case the burden or duty of testifying, or calling any witnesses or locating or producing any evidence.

The law presumes the defendant to be innocent of all of the charges against him. I therefore instruct you that the defendant is to be presumed by you to be innocent throughout

your deliberations until such time, if it ever comes, that you as a jury are satisfied that the government has proven him guilty beyond a reasonable doubt.

The defendant began the trial here with a clean slate. This presumption of innocence alone is sufficient to acquit the defendant unless you as jurors are unanimously convinced beyond a reasonable doubt of his guilt, after a careful and impartial consideration of all of the evidence in this case. If the government fails to sustain its burden, you must find the defendant not guilty.

This presumption was with the defendant when the trial began and remains with him even now as I speak to you and will continue with the defendant into your deliberations unless and until you are convinced that the government has proven his guilt beyond a reasonable doubt.

The defendant, Daniel Karron, did not testify in this case. Under our Constitution, a defendant has no obligation to testify or to present any evidence, because it is the government's burden to prove the defendant guilty beyond a reasonable doubt. That burden remains with the government throughout the entire trial and never shifts to the defendant. The defendant is never required to prove that he is innocent.

You may not attach any significance to the fact that the defendant did not testify. No adverse inference against him may be drawn by you because he did not take the witness

stand. You may not consider this against the defendant in any way in your deliberations in the jury room.

Now, I have said that the government must prove that the defendant is guilty beyond a reasonable doubt. The question naturally is, "What is a reasonable doubt?" The words almost define themselves. It is a doubt based upon reason and common sense. It is a doubt that a reasonable person has after carefully weighing of the evidence. It is a doubt which would cause a reasonable person to hesitate to act in a matter of importance in his or her personal life. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his own affairs. Reasonable doubt is not a caprice or whim; it is not speculation or suspicion. It is not an excuse to avoid the performance of an unpleasant duty. And it is not sympathy.

In a criminal case, the burden is at all times upon the government to prove guilt beyond a reasonable doubt. The law does not require that the government prove guilt beyond all possible doubt; proof beyond a reasonable doubt is sufficient to convict. This burden never shifts to the defendant, which means that it is always the government's burden to prove each of the elements of the crimes charged beyond a reasonable doubt.

If, after fair and impartial consideration of all of

the evidence, you have a reasonable doubt, it is your duty to acquit the defendant. On the other hand, if after fair and impartial consideration of all the evidence, you are satisfied of the defendant's guilt beyond a reasonable doubt, you should vote to convict.

Under your oath as jurors you are not to be swayed by sympathy. You are to be guided solely by the evidence in this case, and the crucial, hardcore question that you must ask yourselves as you sift through the evidence is: Has the government proven the guilt of the defendant beyond a reasonable doubt?

It is for you alone to decide whether the government has proven that the defendant is guilty of the crime charged solely on the basis of the evidence and subject to the law as I charge you. It must be clear to you that once you let fear or prejudice or bias or sympathy interfere with your thinking, there is a risk that you will not arrive at a true and just verdict.

If you have a reasonable doubt as to the defendant's guilt, you should not hesitate for any reason to find a verdict of acquittal. But on the other hand, if you should find that the government has met its burden of proving the defendant's guilt beyond a reasonable doubt, you should not hesitate because of sympathy or any other reason to render a verdict of guilty.

The question of possible punishment of the defendant is of no concern to the jury and should not, in any sense, enter into or influence your deliberations. The duty of imposing a sentence on any convicted defendant rests exclusively upon the court -- that is, upon me. Your function is to weigh the evidence in the case and to determine whether or not the defendant is guilty beyond a reasonable doubt, solely on the basis of such evidence. Under your oath as jurors, you cannot allow a consideration of the punishment which may be imposed upon the defendant, if he is convicted, to influence your vote in any way, or in any sense to enter into your deliberations.

Now, with these preliminary instructions in mind, let us turn to the charge against the defendant, as contained in the indictment. I remind you that an indictment itself is not evidence. It merely describes the charge made against the defendant. It is an accusation. It may not be considered by you as any evidence or proof of the guilt of the defendant. Only the evidence or the lack of evidence presented here at trial before you is relevant to that issue.

The defendant, Daniel Karron, is formally charged in an indictment which contains one count. Before you begin your deliberations, you will be provided with a copy of the indictment containing the charge.

Count One of the indictment charges that from at least

in or about October 2001, up through and including in or about June 2003, Daniel B. Karron, the president and chief technical officer of a company called Computer Aided Surgery, Inc. (CASI), intentionally misapplied $5,000 and more in the care, custody and control of CASI, while it was the beneficiary of a federal grant of more than $10,000 a year from the National Institute of Standards and Technology, a federal entity.

The indictment reads as follows:

Count One. The grand jury charges:

1. From at least in or about October, 2001, up through and including in or about June 2003, in the Southern District of New York and elsewhere, Daniel B. Karron, the defendant, being an agent of an organization, which organization received in any one-year period benefits in excess of $10,000 under a federal program involving a grant, contract, subsidy, loan, guarantee, insurance and other form of federal assistance, unlawfully, willfully and knowingly did embezzle, steal, obtain by fraud, and otherwise without authority, knowingly convert to the use of -- let me just go back a little bit -- obtained by fraud and otherwise without authority knowingly convert to the use of persons other than the rightful owner, and intentionally misapplied property valued at $5,000 and more that was owned by and was under the care, custody and control of such organization, to wit, Karron, who was the president and chief technical officer of Computer Aided Surgery

Inc., (CASI), knowingly misapplied more than $5,000 of funds under the care, custody and control of CASI, which received more than $10,000 in federal funds during a one-year period from the Advanced Technology Program administered by the National Institute of Standards and Technology.

And it cites Title 18 United States Code, Section 666.

Title 18 United States Code, Section 666, reads in pertinant part as follows: "Theft or bribery concerning programs receiving federal funds.

(a) Whoever, if circumstance described in subsection (b) of this section exists --

(A) Embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that is valued at $5,000 or more, and is owned by, or is under the care, custody, or control of such organization, government, or agency, is guilty of a crime.

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one-year period, benefits in excess of $10,000 under a federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of federal assistance.

(c) This section does not apply to bona fide salary, wages, fees, other other compensation paid, or expenses paid or

reimbursed, in the usual course of business.

In order to sustain its burden of proof with respect to the allegation in Count one, the government must prove beyond a reasonable doubt the following five elements:

First, at the time alleged in the indictment, the defendant was an agent of Computer Aided Surgery, Inc., or CASI;

Second, in a one-year period, CASI received a federal grant in excess of $10,000;

Third, during that one-year period, the defendant without authority intentionally misapplied the grant money;

Fourth, the misapplied grant money was under the care, custody, or control of, CASI;

Fifth, the value of the money intentionally misapplied by defendant was at least $5,000.

Now, let us separately consider these five elements.

The first element the government must prove beyond a reasonable doubt is that at the time alleged in the indictment, the defendant was an agent of CASI.

The term "agent" means a person authorized to act on behalf of an organization. Employees, partners, directors, officers, managers and representatives are all agents of an organization.

Second element the government must prove beyond a reasonable doubt is that in a one-year period, CASI received

federal benefits in excess of $10,000.

To prove this element, the government must establish that CASI received, during a one-year period, benefits in excess of $10,000 under a federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or some other form of federal assistance.

The one-year period must begin no more than 12 months before the defendant committed the acts charged in the indictment and must end no more than 12 months after those acts. You can choose any period of federal funding you want as long as you unanimously find that the acts of misapplication charged in the indictment occurred in that one-year period.

The third element the government must prove beyond a reasonable doubt is that the defendant without authority intentionally misapplied money. To intentionally misapply money means to use money under the control of CASI knowing that such use is unauthorized or unjustifiable or wrongful. Intentional misapplication includes the wrongful use of the money for a purpose the defendant knew was unauthorized, even if such use benefited CASI in some way.

In this case, to intentionally misapply money means to intentionally apply the grant money received by CASI in a manner which the defendant knew was unauthorized under the terms and conditions of the grant. Misapplication of money, however, does not apply to bona fide salary, wages, fringe

benefits, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.

As I said, the government must prove beyond a reasonable doubt that the defendant acted intentionally in misapplying grant money. To find that the defendant acted intentionally, you must be satisfied beyond a reasonable doubt that the defendant acted deliberately and purposefully. That is, the defendant's misapplication must have been the product of the defendant's conscious objective to spend the money for an unauthorized purpose, rather than the product of a mistake or accident or some other innocent reason.

The fourth element that the government must prove beyond a reasonable doubt is that the grant money that was intentionally misapplied was in the care, custody, or control of, CASI. Although the words "care," "custody," and "control" have slightly different meanings, for the purposes of this element, they express a similar idea. All that is necessary is that CASI had control over and responsibility for the grant money.

The fifth and final element the government must prove beyond a reasonable doubt is that the value of the intentionally misapplied money was at least $5,000.

The word "value" means face, par or market value, or cost price, either wholesale or retail, whichever is greater. "Market value" means the price a willing buyer would pay a

willing seller at the time the property was intentionally misapplied.

You may aggregate or add up the value of the money intentionally misapplied from a series of acts by the defendant to meet this $5,000 requirement, so long as you find that each act of intentional misapplication was part of a single scheme by the defendant to misapply grant money under the care, custody, and control of CASI.

The government does not have to prove that the particular money misapplied by the defendant was the money received by CASI as a federal grant. In other words, it is not necessary for the government to show that the intentionally misapplied money was traceable to the actual federal grant received by the organization. Thus, if the government establishes that CASI received more than $10,000 in federal aid during a one-year period, and that, during that period, the defendant misapplied funds valued at more than $5,000 under the care, custody, and control of CASI, the government will have satisfied its burden with respect to this element. Money is fungible, and the government need not trace the $5,000 or more alleged to be intentionally misapplied back to the federal grant.

In addition to the elements of the offenses that I have explained, you must consider whether any act in furtherance of the crime charged in the indictment occurred

within the Southern District of New York. As I have instructed you, the Southern District of New York includes Manhattan and the Bronx.

I should note that on this issue -- and this issue alone -- the government need not prove venue beyond a reasonable doubt, but only by a mere preponderance of the evidence. Thus, the government has satisfied its venue obligations if you conclude that it is more likely than not that any act in furtherance of the crime charged occurred in the Southern District of New York.

You have heard evidence during the trial that witnesses have discussed the facts of the case and their testimony with the lawyers before the witnesses appeared in court.

Although you may consider that fact when you are evaluating a witness's credibility, I should tell you that there is nothing either unusual or improper about a witness meeting with lawyers before testifying so that the witness can be aware of the subjects he or she will be questioned about, focus on those subjects and have the opportunity to review relevant exhibits before being questioned about them. Such consultation helps conserve your time and the court's time. In fact, it would be unusual for a lawyer to call a witness without such consultation.

Again, the weight you give to the fact or the nature

of the witness's preparation for his or her testimony and what inferences you draw from such preparation are matters completely within your discretion.

Now, you have heard testimony from what we call expert witnesses. An expert witness is a person who by education or experience has acquired learning or experience in a science or a specialized area of knowledge. Such witnesses are permitted to give their opinions as to relevant matters in which they profess to be expert, and give their reasons for their opinions.

Expert testimony is presented to you on the theory that someone who is experienced in the field can assist you in understanding the evidence or in reaching an independent decision on the facts.

Now, your role in judging the credibility applies to experts as well as to other witnesses. You should consider the expert's opinions that were received in evidence in this case and give them as much or as little weight as you think they deserve.

If you should decide that the opinion of an expert is not based on sufficient education or experience, or on sufficient data, or if you should conclude that the trustworthiness or credibility of an expert is questionable for any reason, or if the opinion of the expert was outweighed in your judgment by other evidence in the case, then you might

disregard the opinion of the expert entirely or in part.

On the other hand, if you find the opinion of the expert was based on sufficient data, education and experience, and other evidence, and does not give you reason to doubt his conclusions, you would be justified in placing great reliance on his testimony.

If you conclude that other persons may have been involved in criminal acts charged in the indictment, you may not draw any inference, favorable or unfavorable, toward either the government or the defendant from the fact that those persons are not named as defendants in this indictment or are not present at this trial.

In addition, you should not speculate as to the reasons that individuals other than the defendant are not defendants in this trial. Those matters are wholly outside your concern and have no bearing on your function as jurors in this trial.

Both the government and the defendant have the same power to subpoena witnesses to testify on their behalf. If a potential witness could have been called by the government or by the defendant and neither party called the witness, then you may draw the conclusion that the testimony of the absent witness might have been unfavorable to the government or to the defendant or to both parties.

On the other hand, it is equally within your province

to draw no inference at all from the failure of a party to call a witness.

You should remember that there is no duty on either side to call a witness whose testimony would be merely cumulative of testimony already in evidence, or who would merely provide additional testimony to facts already in evidence.

You have heard reference, in the testimony and in the arguments of defense counsel in this case, about the fact that certain investigative techniques were not used by law enforcement authorities. There is no legal requirement that the government prove its case through any particular means. While you are to carefully consider the evidence presented by the government, you are not to speculate as to why they used the techniques they did, or why they did not use other techniques. The government is not on trial, and law enforcement techniques are not your concern.

Your concern is to determine whether or not, based on the evidence or lack of evidence, the guilt of the defendant has been proven beyond a reasonable doubt.

There is testimony in this case of the previous good character of the defendant. This testimony is not to be taken by you as the witnesses' opinion as to whether the defendant is guilty or not guilty. That question is for you alone to determine. Indeed, some of the character witnesses testified

that they had no direct, personal knowledge of the facts and circumstances which were the focus of this case. You should consider evidence of good character together with all other facts and all the other evidence in determining whether the prosecution has sustained its burden of proving the defendant's guilt beyond a reasonable doubt. Evidence of good character may in itself create a reasonable doubt where without such evidence no reasonable doubt exists. But if, from all the evidence, you are satisfied beyond a reasonable doubt that the defendant is guilty, a showing that the defendant previously enjoyed a reputation of good character does not justify or excuse the offense, and you should not acquit the defendant merely because you believe that he had been a person of good repute.

Some of the exhibits that were admitted into evidence were charts. These charts were introduced basically as summaries. They are not direct evidence. They are summaries of the evidence, and are admitted as aids to you. They are not in and of themselves any evidence. They are intended only to be of assistance to you in considering the evidence during your deliberations.

In presenting the evidence which you have heard, it is clearly easier and more convenient to utilize summary charts than to place all of the relevant documents in front of you. It is up to you to decide whether those charts fairly and

correctly present the information in the testimony and the documents admitted in evidence. The charts are not to be considered by you as direct proof of anything. They are merely graphic demonstrations of what the underlying testimony and documents are.

To the extent that the charts conform with what you determine the underlying evidence to be, you should accept them. But one way or the other, realize that the chart is not in and of itself direct evidence. They are merely visual aids. They are nothing more.

You are about to go into the jury room and begin your deliberations. If during those deliberations you want to see or hear any of the exhibits, they will be sent to you in the jury room upon question. If you want any of the testimony read, that can also be done. But please remember that it is not always easy to locate what you want, so try and be as specific as you possibly can in requesting exhibits or portions of the testimony which you may want.

Your requests for exhibits or testimony -- in fact any communication with the court -- should be made to me in writing, signed by your foreperson, and given to one of the marshals. I will respond to any questions or requests you have as promptly as possible either in writing or by having you return to the courtroom so I can speak to you in person. In any event, do not, in any note or otherwise, tell me or anyone

else how you or any group of you have voted or propose to vote on the issue of the defendant's guilt until after a unanimous verdict is reached. In other words, do not tell me or anyone else what your numerical division is -- how many think one way and how many think another -- if you are divided at any point on how to decide the case because until you have reached a verdict, you have no verdict.

I am sending a copy of the indictment into the jury room for you to have during your deliberations. You may use it to read the crime with which the defendant is charged with committing. You are reminded, however, that an indictment is merely an accusation and is not to be used by you of any proof of the conduct charged.

As already explained in these instructions, the government, to prevail on the charge in the indictment must prove the essential elements of that count in the indictment beyond a reasonable doubt.

If it succeeds, your verdict should be guilty as to that count; if it fails, it should be not guilty as to that count. To report a verdict, your vote must be unanimous.

Your function is to weigh the evidence in the case and determine whether or not the defendant is guilty of the count in the indictment solely on the basis of such evidence.

Now, to aid you in your deliberations, and so that a proper record can be made of your verdict, the court has

prepared a form of verdict. I am asking that the verdict form be signed by the foreperson and filed with the court. When you have unanimously agree upon your verdict, then the foreperson will fill it in and sign it, and you tell the marshal you have reached a verdict. Then you will be asked to come back into open court and the clerk will ask whether your verdict is unanimous.

It's a simple verdict form. Please hand it out. The verdict form form reads as follows: " Count 1: With respect to Count One of the indictment, S2 07 Crim. 541 (RPP), how do you find the defendant Daniel B. Karron?" And it states guilty, not guilty and a space for each answer. That's it.

Just because of the phraseology, there is only one count in the indictment. There is no other charge against the defendant. So don't draw the conclusion there must be other charges.

Now, each juror is entitled to his or her opinion; each should, however, exchange views with his or her fellow jurors. That is the very purpose of jury deliberation -- to discuss and consider the evidence; to consider the arguments of fellow jurors; to present your individual views; to consult with one another; and to reach an agreement based solely and entirely on the evidence or the lack of evidence -- if you can do sought without violation to your own individual judgment.

Each of you must decide the case for yourself, after

consideration with your fellow jurors of the evidence in the case.

But you should not hesitate to change an opinion which, after discussion with your fellow jurors, appears incorrect.

However, if, after carefully considering all of the evidence and the arguments of your fellow jurors, you hold a conscientious view that differs from the others, you are not to change your position simply because you are outnumbered. If they do not convince you that your position is incorrect, you shall adhere to your position regardless of the lateness of the hour or any personal inconvenience it may cause you.

Your final vote must reflect your conscientious belief as to how the issue should be decided.

Now, I have virtually finished with my charge and my instructions to you and I want to thank you for your patience and attentiveness. I will send a copy of the charge in to you so that you can use it during your deliberation. Again, please remember that no single part of this charge is to be considered in isolation. You are not to consider any one aspect of this charge out of context. The entire charge is to be considered as an integrated statement and to be taken together.

Now, I say this not because I think it's necessary but it is the tradition of this court. I advise the jurors to be polite and respectful to each other, as I am sure you will be

in the course of your deliberations, so that each juror may have his or her position made clear to all the others.

The foreperson has no greater authority than any other juror but will be responsible for signing all communications to the court and for handing them to the marshal during deliberations. You should elect one person to act as foreperson at the outset of your deliberations. I sometimes suggest that it is easier to elect Juror 1, that is Ms. Young, but sometimes Juror 1 doesn't want to act as foreperson. So you all can elect whomever you want. That is your prerogative. The manner in which the jury conducts its deliberations, of course, is completely within your discretion. You may follow any procedure that you choose, provided that each juror is presented with ample opportunity to express his or her view. That way when you do reach a verdict you will know that it is a just one, made with the full participation of all the jurors and that you have faithfully discharged your oath. I remind you once again that your duty is to act without fear or favor and that you must decide the issues on trial based solely on the evidence and my instructions on the law.

Thank you very much. I just want a word with counsel to see if I misread any part of the charge.

(Continued on next page)

(At the sidebar)

THE COURT: Any objections?

MR. RUBINSTEIN: No, your Honor, not by the defense.

MR. KWOK: No, your Honor.

THE COURT: OK.

(Continued on next page)

(In open court)

THE COURT: I think the alternates will be coming back in. I will excuse them on the record. I don't think there is any record that the two alternates have been excused, and I think I have to do it.

MR. RUBINSTEIN: Can we approach for one moment?

THE COURT: Sure.

(At the sidebar)

MR. RUBINSTEIN: Judge, I know you usually discharge alternates jurors, but am I correct that Juror 8 is supposed to leave on Friday?

THE COURT: Not available Monday.

MR. RUBINSTEIN: Not available Monday.

THE COURT: So, you have two and a half days.

MR. RUBINSTEIN: I think we should be all right. All right.

MR. KWOK: I think we should be fine.

MR. RUBINSTEIN: If they promise not to retry the case.

THE COURT: OK. All right.

(Continued on next page)

(In open court)

THE COURT: Well, at this time it's my duty to excuse alternate jurors, I guess you were 3 and 4, Mr. Richburg and Ms. Ippolito. You may not realize that one of my duties is to make -- well, I do think you realize because of the comment I made earlier in the trial about making sure the jurors weren't asleep -- but one of my duties is to make sure that jurors are paying attention. And I have noticed that both of were you paying attention throughout the trial and were very attentive, more than just paying attention, and I really want to thank you for your service.

In civil cases we allow alternates to sit on the jury, but in criminal cases there is a requirement that there be 12 jurors and not more. So, at this time I want to excuse you and thank you for your public service. I appreciate it.

And what Mr. Rubinstein said in his summation about public service of jurors is I think very accurate. I think he may have picked that up from me in a previous trial we had, but in any event I really regard it as very high public service, and I will give the jury a more full explanation of why I think that when the trial is over.

So, Mr. Richburg and Ms. Ippolito, are excused.

(Alternates excused)

Then I have the duty of asking Mr. Monteguedo to swear in the marshal now. I usually tell the jury that they should

listen closely to this, because you will get a kick out of it. I think it was written well over a hundred years ago, let's say, and some of the language is a little out of date.

(Marshal sworn)

THE COURT: All right. The jury is excused to commence your deliberations and to have lunch. That's probably number one, have lunch. I hope it's there.

DEPUTY COURT CLERK: It's downstairs. I have to go and get it.

THE COURT: He has to go and get it.

(Jury retires to deliberate at 1:22 p.m.)

THE COURT: I want to thank counsel for their courteousness and professionalism during the trial. I appreciate it very much. Good luck to both sides, and I will be here.

MR. RUBINSTEIN: Thank you, your Honor.

MR. KWOK: Thank you, your Honor.

(Luncheon recess)

(Continued on next page)

AFTERNOON SESSION

2:25 p.m.

(Jury not present)

THE COURT: I understand we have some sort of dispute. As has been related to me, the defense wants the indictment sent in total without redaction, and the government wants it sent in with the forfeiture allegation redacted.

MR. RUBINSTEIN: That's correct.

THE COURT: That's the issue?

MR. RUBINSTEIN: Yes, your Honor.

THE COURT: Obviously they're not supposed to determine the forfeiture allegations, so I would say what about my just sending it in and then with a note saying here is the indictment, you will note that there are forfeiture allegations but those allegations are not before you and not matters that you have to concern yourselves with, something like that? How does that deal with it?

MR. KWOK: I think an instruction along those lines would suffice. Our only concern is that there is a mention in paragraph 2A of at least $390,000. They may get confused as to where that number came from. And obviously they haven't been instructed about any forfeiture allegations in the indictment, so our only concern is that it will cause more confusion than necessary, and so an instruction along those lines --

THE COURT: I can understand why you feel it should be

redacted, but the defense does not want to redact it.

You don't want it redacted?

MR. RUBINSTEIN: No, your Honor. I don't have a problem with your Honor's --

THE COURT: Well, it's in the indictment, so let me fashion a note.

"Here is a copy of the indictment. You will note it contains a forfeiture allegation. Those allegations are irrelevant to your decision" --

MR. KWOK: -- "and you should not consider it in any way in your deliberations."

THE COURT: Is that all right?

MR. RUBINSTEIN: Yes.

MR. EVERDELL: Your Honor, also I think it may be even clearer if we say, "You will note there is a forfeiture allegation on page 2 of the indictment."

THE COURT: Well, I've gone too far now.

Here is the note. I have it it marked as Court Exhibit 1.

DEPUTY COURT CLERK: No, that's going to be Court Exhibit 3.

THE COURT: Court Exhibit 3.

DEPUTY COURT CLERK: Court Exhibit one was the exhibit. Court Exhibit 2 was the charge. This will be 3. And the indictment is Court Exhibit 4.

THE COURT: Hand it to counsel before we send it in.

MR. KWOK: That's satisfactory to the government government. Thank you, your Honor.

THE COURT: All right, Mr. Rubinstein?

MR. RUBINSTEIN: That's fine.

THE COURT: OK.

All right.

(Time noted 3:25; jury not present)

THE COURT: They want all of Benedict's testimony? And Exhibit 110, 111, 114 and 115.

MR. RUBINSTEIN: All I would say is those are all summaries.

THE COURT: Well, they're the audit, aren't they? The government isn't here. Oh, they are.

THE COURT: Have you seen the note?

MR. KWOK: We have, your Honor.

MR. EVERDELL: We're pulling the exhibits now.

THE COURT: Maybe I better read it into the record.

This is Court Exhibit 5, received from the jury at 3:12, and signed by Ms. Young. It says.

"1. Bob Benedict's testimony.

"2. Number 110.

"3. Number 111.

"4. 114

"5. 115.

"6. Original budget.

"7. Revised approved budget.

"8. Nonapproved subsequent budget revisions."

My recollection is we only have some of the budget revisions, not all of the budget revisions. Am I wrong?

MR. EVERDELL: No, I think we have the revised budget submissions that were not approved. I think what your Honor may be referring to is the quarterly financial reports.

THE COURT: Oh, that's right.

MR. EVERDELL: But the exhibits, I think we have the exhibits that they want.

THE COURT: Well, we have to go through the testimony of Benedict.

MR. KWOK: How does your Honor like to proceed with the testimony? Do we do a read-back?

THE COURT: Whenever you've got anything ready, let's send it in. It's 3:25. They've got to be kept busy. We can't hold back.

MR. RUBINSTEIN: We have to redact if there is any objections.

THE COURT: I don't remember if there is much in Benedict's direct or cross that requires redaction, but maybe there is.

MR. RUBINSTEIN: I don't either, but maybe there is.

THE COURT: You have to cut out the pages where the

jury wasn't present. But as far as redaction goes, there were very few objections in either direct or cross, I believe.

So, let's divide it up so we all don't look at the same copy. Do you want my copy?

DEPUTY COURT CLERK: Defense counsel doesn't have a copy of the copy of the transcript.

THE COURT: What I'm talking about is dividing up the duties, so one of you goes through page so and so and the other goes through such and such.

MR. RUBINSTEIN: If the court will give us their transcript, I will tell the government what pages I have.

THE COURT: What about before we get started on that, what about the other exhibits, do we have those?

MR. KWOK: We do, your Honor.

MR. EVERDELL: Your Honor, how do we propose to mark what they are for the jury? I'm not sure the jury is going to know that --

THE COURT: I will give them a note.

MR. EVERDELL: We just want to be able to identify which numbers.

THE COURT: In response to your note, I'm sending you in government's exhibits, Bob Benedict's testimony, the revised approved budget, and then I will identify them by exhibit number. So it's clear, so you make a clear record of what is and isn't sent in.

MR. EVERDELL: I just want to be sure they know which is which.

THE COURT: Have you got 110, 111, 114 and 115?

MR. EVERDELL: We have those, your Honor.

DEPUTY COURT CLERK: Do you want to send those three exhibits in, Judge?

THE COURT: I do. I want the other ones too.

DEPUTY COURT CLERK: Right. I just don't know if you want to send them all together or --

THE COURT: As many as they have ready.

DEPUTY COURT CLERK: 110, 111, 114 and 115, Judge, we will send those?

THE COURT: What about the budget, do we have those?

MR. EVERDELL: Yeah, I'm just marking them "original approved budget" for Government's 14 and "revised approved budget" for 22, and "unapproved budget" for Government's Exhibits 31, 32, 33, 34, 35 and 36. Or "unapproved budget requests". And I will put the numbers down, 31, 32 ...

The unapproved budget requests are 31 through 36. And I am putting sticky notes on them.

Actually if you have a rubberband we can rubberband them together.

THE COURT: Is there one nonapproved budget or two nonapproved budget?

MR. EVERDELL: It's six.

THE COURT: Oh, I've got it.

MR. EVERDELL: So, I will hand these up to Robert.

THE COURT: To the jurors, I will read the note I propose to send in.

"In response to your note, here are Exhibits 110, 111, 114 and 115; original budget, GX14; revised budget approved, GX22; Nonapproved subsequent budget, GX31, 32, 33, 34, 35, 36.

"We are working on Mr. Benedict's testimony."

MR. KWOK: That's fine with the government. I actually have the lines ready to be redacted for Mr. Benedict's testimony, if your Honor would like to --

THE COURT: It's all redacted?

MR. KWOK: I think there are only two places that need redaction.

THE COURT: Well, why don't we send this in. I don't know how long it will take to get agreement on the redactions. And I will send this note in with it, if there is no objection by counsel. It's Court Exhibit 6.

MR. KWOK: That's fine. Thank you, your Honor.

THE COURT: While Mr. Monteguedo is doing that, let's see what we can do on Mr. Benedict's testimony.

MR. KWOK: Your Honor, I believe Mr. Benedict's testimony starts at page 960 on the transcript.

THE COURT: Mr. Rubinstein has my copy, so I'm not sure. Have we given him the pages of proposed deletions?

Mr. Rubinstein?

MR. RUBINSTEIN: Yes, your Honor. I'm working on the cross.

THE COURT: Were you only doing direct?

MR. KWOK: I was doing direct, but I actually went through the whole thing.

THE COURT: Mr. Rubinstein, I don't know if it will help you, but Mr. Kwok has indicated where he thinks the redactions are. How are we coming?

MR. KWOK: Getting there.

THE COURT: How many pages do we have to read, or is it better to redact it?

MR. RUBINSTEIN: No, I think it's better -- there are not that many, but there are a lot more than the government suggests.

I'm almost there. I just want to show the government some that are not major but that I ...

THE COURT: Sorry?

MR. RUBINSTEIN: They're not major, but let me show the government the portions that I think could be redacted.

We are in agreement.

THE COURT: Well, how are we going to make the redaction? Read it? How long is it?

MR. KWOK: It's quite long actually. I think our preference is to to send in a copy and just redact using a

black highlighter of some sort.

MR. RUBINSTEIN: Most of the redactions, Judge, are just a few lines, so I wouldn't have a problem with that.

THE COURT: Then let's do it that way. Let's get it started.

MR. RUBINSTEIN: The only thing I would suggest is --

THE COURT: Bring back a final so Mr. Rubinstein can see them.

MR. KWOK: Certainly.

THE COURT: So he can see that you made them correctly.

Let's move, otherwise they may make a decision.

MR. EVERDELL: We're going to make a photocopy of your Honor's bigger version so it's easy to read. We will redact it and bring it back.

THE COURT: You are using my copy?

MR. EVERDELL: Of the transcript.

THE COURT: Do you have to make copies?

MR. EVERDELL: We can make copies or just instruct the jury not to peel off the white tape.

MR. RUBINSTEIN: That's fine. Instruct them not to peel off the white tape.

THE COURT: Can I have my note back?

I have the note. Are you ready? Counsel, are you ready?

MR. KWOK: OK. Your Honor, I think we have an agreement. The transcript is redacted with the approval of Mr. Rubinstein and the government, and I think we also should send in the blow-ups, because they are the actual exhibits, these big boards, Exhibits 114 and 115.

THE COURT: I sent in 114 and 115.

MR. KWOK: I understand, but as I understand it these are the ones that are actually marked.

THE COURT: Well, I gave what you gave me which had things marked 114 and 115. I don't know whether Mr. Rubinstein consents to this.

MR. RUBINSTEIN: If they have 114 and 115, I don't think they need the blow-up version.

THE COURT: If we started off that way, I think they would be entitled to it, but I don't think we ought to send duplicate exhibits in.

MR. KWOK: OK, that's fine. Can I hand up the redacted transcript?

THE COURT: All right. Then I have drafted a note to the jurors saying, "Here is the testimony of Mr. Benedict that you requested." And I signed that note, and below that I have written in, "You are ordered not to remove the white tape."

Is that what you want?

MR. KWOK: I think that's fine. We also, after we ran out of the white tape, we used a black marker. I suppose if

you hold it up, you can really see it under the light, but I don't know whether an additional instruction is necessary to that effect.

THE COURT: What does he want me to say? "Or the black line"? I can't tell them to remove the black lines.

MR. KWOK: "Or attempt to see through the black line".

MR. RUBINSTEIN: I think they will understand it, Judge. There are no smoking guns that have been redacted; it's just objection sustained.

THE COURT: It's adequate, "You are not to remove the white tapes"? Is that adequate?

MR. KWOK: Fine.

THE COURT: Then the note is Exhibit 7. The transcript will be Court Exhibit 8.

(5:25; jury not present)

THE COURT: Mr. Monteguedo informs me that the marshals have indicated that the jury has a verdict.

Bring the jury in.

(Jury present)

THE COURT: Please be seated. Ladies and gentlemen, Mr. Monteguedo reports that the marshals have reported that you have reached a verdict, and I will ask Mr. Monteguedo to take the verdict.

DEPUTY COURT CLERK: Ladies and gentlemen of the jury, please answer to your presence as your name is called.

(Jury roll called; jury present)

DEPUTY COURT CLERK: Foreperson please stand.

As to Count One, with respect to Count One of indictment, S2 07 Crim. 541 (RPP), how do you find the defendant Daniel B. Karron. Did you answer guilty or not guilty?

THE FOREPERSON: Guilty.

DEPUTY COURT CLERK: Thank you. Please be seated.

Ladies and gentlemen of the jury, please listen to your verdict as it stands recorded. With respect to Count One of indictment, S2 07 Crim. 541 (RPP), how could you find the defendant Daniel B Karron? You answered guilty.

(Jury polled; each juror answered in the affirmative)

THE COURT: Well, ladies and gentlemen, I never comment on a verdict, and I do like to comment, however, on jury service. And as I told the alternates, one of my duties is to watch the jury, keep an eye on them, make sure that no one is falling asleep. I had a few questions about Juror 3 at one point, but I noticed that although she sat back in her chair she kept her eyes open and was fully aware of what was going on. But that's what my job is in part.

So one of the problems is, and one of the reasons I don't comment upon verdicts is because I other duties that I have to think about, whether under the law of evidence the question is appropriate, and there are a number of rules in the law of evidence that apply, how the questions is framed and whether it's an appropriate question, whether it's relevant, what have you. So I have other things to do besides listening to the actual testimony and watching the jurors and what have you.

But what I really want to mention is how important jury service is in this country. In most countries in Europe there are no juries. The only country that has juries is Great Britain, Australia and some in Canada, and even there in most cases they have done away with juries. It is an expenditure, and it requires a lot more time to have a jury trial than it does to have a nonjury trial.

In this country almost all the trials are jury trials.

Now, why is that important? Well, some years ago, before Hungary came out from behind the iron curtain, I went with a number of other judges and lawyers to Hungary, and we were invited there to discuss their new constitution, and I don't know that we added much. I found in fact that the people in Hungary that we were talking to were very intelligent people and not only knew all about how our Constitution worked but they also knew how all the other Constitutions in the world worked. And there are a lot of Constitutions in the world actually, and a lot of them have traditions that are very similar to ours, and in fact Russia has a Constitution and it provided for a lot of the things that are provided for in our Constitution. The only problem was who decided whether those rights applied. The state had the sole determination. There was no right by the people to bring suits in the courts challenging the state.

In any event, what I found was that there was great dissatisfaction of the system of justice in Hungary, and the reason was this: Judges decided everything. Judges were trained at the university to become judges, and when they got out of university they became junior judges, and then they moved up and became more senior judges. It was a profession just as if you were a doctor you became a judge. And you became a judge if you were a member of the Communist party. And if you didn't, and if you weren't a member of the Communist

party, these people felt you didn't get a fair shake in court, whether it be a civil or criminal case. And here in this country it's true judges are appointed by the President in the case of federal judges, and they are elected to some posts in the state courts, but they are also appointed judges in the state courts, and it's true that that means there is a certain amount of political input. And I happen to think that's overstated. In other words, I don't think people do decide -- certainly district court judges I am convinced don't decide cases because they came from some political party. I mean we are appointed by some president, one or another, but there are stories in the paper and on television, on your talk shows, wondering who appointed that judge, well, he is going to decide such and such. Well, if we didn't have jurors, they would be saying that about the cases that come up for trial, and what confidence would the public have in the fairness of the procedure? If they believe that politics decided the lawsuits in the courts, they would, or that would be the talk.

So, what does the jury system do? Well, you saw Mr. Monteguedo here pull the names out of the hat, call them. No one knows anything about your political background. No one can challenge that you are independent determiners of the facts. And that's the great thing about jury service, it's the validation of our criminal justice system in our country. It doesn't mean you have to agree with every decision a jury

reaches throughout the country. But remember when you are criticizing them, if you do criticize them, that they heard the evidence, you didn't. Nor did the reporters report all the evidence. They saw the witnesses that testified, reporters come in and out of the courtroom and come and go. They don't hear everything. So, you don't always get -- it may be that you don't always get a fair shake in the press.

I haven't tried a case with television, but I recently had a case before me, still before me -- I haven't decided it yet, but it had a lot of notoriety and you should read what the papers in England said that I did and said and what have you. You couldn't believe it. At least I couldn't believe it.

All I'm saying is you the jury are the great validaters of our system of justice. That's what is so important about jury service, because each one of you when you serve are an independent person reviewing the facts and the evidence. It's much better than having a judge be in that position, because it makes it clear that things aren't decided on politics.

So I want to thank you for your service, and I am sorry to hold you to listen to me talk. And I guess I will tell you the third great lie, and that is that your checks are in the mail. So you are discharged with my thanks and the thanks of the court.

(Jury excused)

THE COURT: I guess I better look at a sentencing date. September 11? I better wait for Mr. Monteguedo to tell me. It takes more than 90 days, doesn't it?

MR. KWOK: I'm not sure.

THE COURT: October 14th or 15th? I don't know what the holidays are. Mr. Rubinstein?

MR. RUBINSTEIN: Neither do I, Judge. Any day is OK.

MR. KWOK: Same for the government.

THE COURT: Do any of you know about the religious holidays on that period?

Apparently Yom Kippur is the 14th or the 15th of October, so that may be a bad time.

Why don't I put it down for September 11th, and if it's an inconvenient date, we will adjourn it to an appropriate date.

MR. RUBINSTEIN: Thank you, your Honor.

MR. KWOK: Thank you, your Honor.

THE COURT: All right.

MR. KWOK: Your Honor, the government does have an application to make. We would move to modify the bail conditions of the defendant.

THE COURT: Well, you will have to remind me what they are.

MR. KWOK: I believe at the time the defendant was first arraigned he was released on $50,000 personal

recognizance bond, cosigned by two people that the government approved, and he did surrender his passport, and he was ordered to make no applications, and his travel restrictions were limited to the District of Columbia, Philadelphia, the District of Connecticut and the Southern District of New York.

It's the government's position that the defendant poses a flight risk. We understand the defendant was a professor. He was unemployed for a number of years before he got the grant. Now that he is convicted I don't believe that any federal agency will award him a grant. He has recently sold his condominium in New York. We are not aware of any strong family ties the defendant has in New York, and as defense counsel pointed out in his summation the defendant also has ties in Canada. And so for all of those reasons I think that --

THE COURT: Well, that was just a vacation, right? Canada? He didn't have any ties in Canada, did he?

MR. RUBINSTEIN: It's where he had the operation, in Canada.

THE COURT: Oh, I see. I didn't even know that the operation --

MR. RUBINSTEIN: Well, I didn't think it was appropriate to state that in summation.

THE COURT: I'm not suggesting. I just didn't -- I thought Canada was a vacation.

MR. RUBINSTEIN: He doesn't have any ties to Canada, your Honor; it's just a lot cheaper in Canada than it is in the United States.

THE COURT: What about postoperative care?

MR. RUBINSTEIN: That was in 2003, your Honor.

THE COURT: That doesn't require him to go back for medical reasons?

MR. RUBINSTEIN: No, your Honor. 2003.

THE COURT: OK. I just don't know anything about the whole area.

MR. KWOK: In any event, your Honor, for all of those reasons, and because of our calculation --

THE COURT: You want to limit Canada? I don't think Mr. Rubinstein -- Mr. Rubinstein says it doesn't matter, Canada, right?

MR. RUBINSTEIN: Right.

THE COURT: So, what else am I supposed to restrict it? What restrictions are you asking for?

MR. KWOK: I'm asking for a more stringent set of bail conditions than were originally set forth.

THE COURT: Well, I'm asking you what ones you're asking for.

MR. KWOK: I propose at the very least an electronic monitor, strict regular pretrial supervision.

THE COURT: What kind of monitoring?

MR. KWOK: Electronic monitoring.

THE COURT: Mr. Rubinstein?

MR. RUBINSTEIN: Your Honor, we are talking about a defendant who has an aging, sick mother who was in the hospital as recently as a month ago on a respirator.

THE COURT: Where does she live?

MR. RUBINSTEIN: She lives in Long Beach, your Honor.

THE COURT: Long Beach, California?

MR. RUBINSTEIN: Long Beach, New York, your Honor. And his brother was in court the other day. He has a brother. He has a daughter who goes to school in upstate New York. And he stayed for this trial. I don't see any reason that the government should want to restrict him. He is not going anywhere. He doesn't have a passport, and there is no place for him to go. So, I would ask your Honor to continue him on the bail conditions that have been previously set.

THE COURT: Well, he has a mother in Long Beach and a brother in where?

MR. RUBINSTEIN: New Jersey.

THE COURT: New Jersey?

MR. RUBINSTEIN: Actually she has a home at the moment. She is in a nursing home in Staten Island, his mother.

THE COURT: Is that the entire family?

MR. RUBINSTEIN: He has a sister in New Jersey.

THE COURT: Another sister in New Jersey?

MR. RUBINSTEIN: He has another brother in New Palls.

THE COURT: Well, there are some family ties, Mr. Kwok. I can see why you would limit other areas, but geographical limits, what reason would there be, other than the -- I don't even know what the sentence would be here.

MR. KWOK: I think based on the very rough calculation, I think the defendant would be at offense level 20, a Criminal History Category I. Think he is facing a guidelines range of somewhere in the 30s.

THE COURT: And what monetary -- what monetary -- is it based on 2B1.1?

MR. KWOK: It's based on 2B1.1.

THE COURT: All right. What figure are you using for loss?

MR. KWOK: I'm using the figure as presented to the jury, about half a million dollars of loss.

THE COURT: Well, I don't think you will be able to show that.

So it's a base level of --

MR. KWOK: -- of six, your Honor.

THE COURT: -- of six. And do you have any reason to believe -- what reason have you got to believe that he would flee?

MR. KWOK: Well, because of the likely sentence that he is facing, because of the lack of any real assets that the

defendant has at this time. He doesn't have a job as far as we know, and he is not likely to be able to get an award of another federal grant in light of his conviction.

THE COURT: But most people don't look for federal grants. That's a small percentage of the opportunities that would be available to him.

MR. RUBINSTEIN: He has been offered a position at Rensselaer College, so I don't know if it's possible for him to take it. So he is more than employable. He is a very respected person.

THE COURT: Rensselaer Polytechnic Institute?

MR. RUBINSTEIN: Yes, your Honor.

THE COURT: Near Albany.

MR. KWOK: I was going to say, your Honor, I can't speak for my colleagues in the civil division, but I think they are contemplating filing a civil complaint to get treble damages based on the amount we showed the government was at loss for.

THE COURT: Treble damages under what statute?

MR. KWOK: I don't know.

THE COURT: It's not an antitrust case.

MR. KWOK: I don't know the name of the statute, but if your Honor recalls, there was a civil assistant who appeared before your Honor a while back while we had a status conference.

THE COURT: I don't recall that.

MR. KWOK: He might be able to --

THE COURT: That doesn't mean anything.

MR. KWOK: He might be able to --

THE COURT: I have had a lot of conferences.

MR. RUBINSTEIN: That makes two of us. I don't recall it either. Maybe it's a senior thing.

MR. KWOK: In any event, my only point is that the defendant, in addition to whatever custodial sentence your Honor may impose, is also likely going to face a huge monetary judgment.

THE COURT: Then what you have is a bankruptcy and he starts over. They can do what they want.

I don't see the grounds for putting a monitor on him. He has shown up here to court every time, a little late sometimes, but he's been here at the trial.

I can understand why you don't want him to go to -- he has surrendered his passport documents -- and you don't want him to go to Canada. You can restrict that. But why shouldn't he be able to go to New York, New Jersey and Connecticut?

MR. KWOK: I don't think he would be precluded necessarily from going to those places if he is placed on regular supervision. He just needs to be in touch with his pretrial services officer as to his whereabouts.

THE COURT: I do think he ought to be under pretrial

services supervision. I agree with that.

He hasn't been under pretrial services supervision, I gather.

MR. KWOK: I do not believe he was.

MR. RUBINSTEIN: No, your Honor.

THE COURT: Well, I think that he should be under pretrial services supervision. And what are the regular terms of pretrial services supervision?

MR. KWOK: I can't remember an exact time frame. As I understand it, often times it's up to the discretion of the pretrial services officer as to what he or she deems necessary. But there is a regular reporting requirement.

THE COURT: Once a week? All right. So let them know and advise the pretrial services officer of any travel he intends to make so that the pretrial services office can be --

MR. RUBINSTEIN: Excuse me?

THE COURT: If the pretrial officer has any concern about travel, he can ask the clerk for my permission.

MR. RUBINSTEIN: Thank you, your Honor.

MR. KWOK: Thank you, your Honor.

THE COURT: All right.

MR. RUBINSTEIN: So, should he go tomorrow to pretrial services?

THE COURT: Yes, sir. All right.

MR. RUBINSTEIN: Thank you, your Honor.

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MR. KWOK: Thank you, your Honor.

MR. EVERDELL: Thank you.

MR. RUBINSTEIN: Have a good day, sir.

THE COURT: Anything else?

MR. RUBINSTEIN: Good night, your Honor.

THE COURT: All right. Good night.

* * *

Sentencing 2 TRASCRIPT (Short)

Sentencing 2 Transcript

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

v. 07 Cr. 541 (RPP)

DANIEL B. KARRON,

Defendant.

----------x

New York, N.Y.
October 20, 2008
2:30 p.m.

Before:

HON. ROBERT P. PATTERSON, JR.,

District Judge

APPEARANCES

MICHAEL J. GARCIA
United States Attorney for the
Southern District of New York
STEVE KWOK
CHRISTIAN EVERDELL
Assistant United States Attorneys

RUBINSTEIN & COROZZO
Attorneys for Defendant
BY: RONALD RUBINSTEIN

ALSO PRESENT: KIRK YAMATANI
RACHEL ONDRIK

(Case called)

MR. KWOK: Good afternoon, your Honor, Steve Kwok for the government. With me at counsel table is Chris Everdell.

THE COURT: Good afternoon, Mr. Kwok and Mr. Everdell.

MR. RUBINSTEIN: Good afternoon, your Honor, Ron Rubinstein for the defendant. I have to apologize. I thought it was 2:30, the sentence. It must have been a senior moment.

THE COURT: I have a presentence report. The latest one is dated October 7, 2008. Has the defendant seen the presentence reports, including the latest one, October 7, 2008?

MR. RUBINSTEIN: Yes, your Honor.

THE COURT: He has read them?

MR. RUBINSTEIN: Yes, your Honor.

THE COURT: Are there any changes to be made?

MR. RUBINSTEIN: No. Except for the objections we have --

THE COURT: Except for the objections that you have in your letter of October 13 and also in a letter received Friday, October 17, 2008, those two letters to the Court?

MR. RUBINSTEIN: That's correct, your Honor.

THE COURT: The government sent us a letter dated October 17 also. I have not received any response by the government to your letter of October 17.

MR. KWOK: The government did not submit a response to the latest letter.

THE COURT: You're willing to proceed on that basis?

MR. KWOK: The government is ready to proceed.

THE COURT: Then I guess the best way -- I don't know how the parties think the best way to proceed, but it would appear to me that the best way to proceed is by considering Mr. Rubinstein's letter of October 17, which disputes the computation of loss contained in the presentence report and in the government's letter.

I might say that I've had some concerns about the loss computation. It's not clear to me that a failure to get approval of expenditures from the grant officer amounts to the same as an intentional misapplication of funds. And to the extent that we have here in this case, as I understand it, the final budget as approved in December 2001, and subsequent to the applications to amend the budget were not approved. So the requisite documents that the Court has to examine of the budget contained in -- is it Exhibit 12?

MR. KWOK: Your Honor, I think the last approved budget is the budget attached to Government Exhibit 22. It's the third page --

THE COURT: It's Exhibit 12. Just a second. Exhibit 12 is the original budget that Dr. Karron signed. Then there is Exhibit 20. 21 was just an administrative contact change. Exhibit 22 contains the final budget approved -- amended budget approved by the agency.

So I have difficulties. For instance, looking at Exhibit 20 and 22 and the fringe benefits being allowed at 34 percent of salary, as I see it in the documents. I have difficulty also with the tabulation contained in Government Exhibit 114 and 115 because they are just rough calculations, as I see it. I don't know who compiled them, but I gather it was Ms. Riley, but we never went into the detail about, for instance, the statement in the tabulation that Dr. Karron's salary budgeted at 175, various cash. He spent 200,486, according to that tabulation. Those amounts, as I saw them, err were salary. They involved loans made which someone, I don't know whom, I presume Ms. Riley, determined the equivalent of salary.

As I alluded to earlier, the fringe benefits figure in this tabulation -- I'm looking at 114 -- says that Dr. Karron didn't spend $40,337 in fringe benefits, and yet in the same tabulation it says that the fringe benefits were not allowed and spent $4,081. That whole scenario of fringe benefits is somewhat illusive to me.

The testimony, as I recollect it, was CASI, the corporation, did not have a formal benefit plan and they were endeavoring to compile one during the time of the grant. And instead what Dr. Karron did was to pay benefits just as he was accustomed to paying them, for whatever medical expenses the various employees had for their wives. I have some difficulty

in, 1, finding that there was criminal intent with respect to these expenditures, which are all on Government 114, and with the manner in which those overexpenditures were computed. It seems to me this is just a rough calculation and not something that a Court could rely on in a criminal case. I'll hear from you. That's my assessment of that proof.

MR. EVERDELL: Your Honor, I think; in fact, I know 114 and 115 are based on Ms. Riley's underlying analysis.

THE COURT: The spreadsheets.

MR. EVERDELL: Yes, the spreadsheets.

THE COURT: But it doesn't meet it because in her spreadsheet she doesn't have any payment like $248,000 worth of salary in year one.

MR. KWOK: Your Honor, she does. That number is the net transfers.

THE COURT: I've looked at salary, I think.

MR. KWOK: Including the tax withholding, I believe is the testimony that she testified to. When you take into account all the money that Dr. Karron took out from CASI, minus the amount that he paid back --

THE COURT: That isn't salary. We are talking about salary. I don't see salary. There is nothing like salary in those documents that equals 248 -- $200,488.

MR. KWOK: Salary is just a heading. What she meant by this is money that defendant took, pure money, not in terms

of expenditure; cash that he took from CASI, whether in the form of quote unquote loan or whether in terms --

THE COURT: Show me. She has no tabulation putting 114 into context with her 110, Exhibit 110.

MR. KWOK: If your Honor could look at Government Exhibit 110.

THE COURT: I did look at Exhibit 110.

MR. KWOK: Page 38.

THE COURT: I have it here. I don't know that I have it here.

MR. KWOK: Page 38 of 44.

THE COURT: I guess we will have to get 110, because I don't think I have it here, but I'm fully familiar with it. I think it's in Mr. Rubinstein's submission, as a matter of fact.

MR. KWOK: That page shows money going to the defendant and money coming from the defendant. So taking --

THE COURT: What page are you referring to? Maybe it's in Mr. Rubinstein --

MR. KWOK: 38 of 44.

THE COURT: He has payroll. Looking at 13 of 44?

MR. KWOK: Page 38 of 44.

THE COURT: That's loan and loan repay. That's not salary.

MR. KWOK: If you look at the memo line, it is salary. Look at, for example, the third check, per check register,

salary advance.

THE COURT: That one she treated as a loan.

MR. KWOK: These are expressed in a spreadsheet as loans, but they are all money going to the defendant.

THE COURT: I understand. It's just not salary.

MR. KWOK: You can give it whatever label you like, but the bottom line is, the defendant took from the company this much money which added to 188.

THE COURT: I don't doubt that's what your calculations are.

MR. KWOK: If I can just correct a misimpression, Government Exhibit 114 is not a rough calculation. It's not a guess. It's based entirely on Government Exhibit 110 which, in turn, is based entirely on the bank records that she reviewed.

THE COURT: They are certainly not in those records, a showing of $200,488 in salary.

MR. KWOK: If I can explain how she got that number.

THE COURT: It's denominated salary. It's a table saying salary. I don't care how she got the number.

MR. KWOK: But that doesn't really affect the loss amount. You can label it and give it whatever label you want. But at the end of the day -- let me back up one step. The grant says Dr. Karron can take from the grant for his own use, whether we call it salary or compensation for efforts that he put into the grant, $175,000. That's the amount -- the portion

of the pie that he can get from the grant, $175,000.

THE COURT: He can get a salary of 175,000 is what it says in the budget, plus 34 percent for fringe benefits.

MR. KWOK: If he took from the grant money in addition to $175,000, putting aside fringe benefit for a second, any amount above that is a disallowed amount, whether you call it excess salary or call it a loan that never gets paid back. It doesn't really matter. At the end of the day, the budget says $175,000 and no more. If you take more than that, the first dollar above $175,000 is disallowed. Whether you call that excess salary or loan, it doesn't really matter.

THE COURT: I'm not dealing with ifs. I'm dealing with what the record shows. This doesn't show what the records show as far as salary goes.

MR. KWOK: It shows that, just for simplicity, she doesn't want to create that many different categories. Salary, loan.

THE COURT: She has got a salary category. She shows it. Go on a couple of pages. Payroll, next page, $35,293.58.

MR. EVERDELL: Your Honor, also, to bear in mind with this, these entries on the spreadsheet are based on how Dr. Karron himself characterized things in the documents. So we have checks here for pay periods that are quote unquote payroll checks for salary. However, he called other things loans or other things like that.

Now, Lynn Riley, in doing this analysis, put those together in the same category because as Mr. Kwok was saying, it was money paid from CASI to Dr. Karron. If he is allowed a payroll, a salary of $175,000, it doesn't necessarily matter how the defendant himself characterizes those payments to himself. Whether he calls them payroll checks or whether he calls them loans, it's still a payment to him personally from CASI funds. So her object, I think in doing it this way, was to sweep together those things which were direct payments from the company to Dr. Karron.

THE COURT: I don't dispute that. But the tabulation is not something that I can go along with. It is not salary.

MR. KWOK: We have no problem with that. If you want to call it salary/loans or just simply money to Karron, excess money to Karron, it doesn't really affect the loss amount because at the end of the day the loss amount is simply arithmetic, what he took from CASI minus what he is supposed to get under the grant, which is $175,000. We have no problem, if it makes things clearer, instead of calling that salary, we could call that, simply, excess money to Dr. Karron.

THE COURT: You see what he did was -- I think it is borne out by the defendant's papers to some degree -- is he took a very low salary to pay back the loans. Is that a fair statement?

MR. EVERDELL: Your Honor, that fact that you just

said, the fact that he didn't take his full salary, is taken into account --

THE COURT: I didn't say that. I want to know whether you're disputing what I just said.

MR. EVERDELL: What I agree with is that, yes, the defendant did not take his full salary in the sense that when you look at salary in checks, they are less than the $175,000 of quote unquote salary.

THE COURT: You saw there was less withholding, right?

MR. EVERDELL: But he paid himself in other ways in things he do did not characterizing as salary.

THE COURT: Was there less withholding or not? You better confer.

MR. EVERDELL: Your Honor, apparently what happened was, he wasn't characterizing anything -- there was no withholding until an accountant came in towards the end of year one and said, you have to call these things payroll, you have to take your salary and then you have to calculate withholding. And that account went back retroactively and looked at these payments and did the withholding retroactively with all these payments to him which had not been characterized.

THE COURT: There are documents appended to the defendant's papers which indicate that the withholding was taken timely. That's not borne out by what you say, showing Mr. Rubinstein's letter of Friday. Where did I put it? He has

got documents showing money being withheld to calculate salary.

MR. KWOK: Which page are you looking at, your Honor.

THE COURT: I'm trying to find the letter now. Attached to it, if you look, it's about ten pages in. It shows the salary, August 2, 2002, salary. It shows outstanding salary of $61,918; federal withholding tax, minus 17,104; social security deduction, 2,091; Medicare and employee 462.81. New York withholding, New York City resident also. It's all in there. He also has one for the pay period 7/01/2002. Maybe that's the same.

MR. KWOK: Are you looking at this page?

THE COURT: Yes, I believe so. It has a check at the top.

MR. EVERDELL: Your Honor, I think this may actually reflect what we are talking about. If you look at check No. 10401. Is that the page you're looking at?

THE COURT: Yes.

MR. EVERDELL: That looks like it was paid out on August 2, 2002, which is towards the end of year one of the grant. If you look at the spreadsheet that Ms. Riley created, it shows that the first actual paid check that he got was in May of 2002; again, sort of towards the end of year one of the grant. This is, as we are getting towards the end of year one, where Dr. Karron is being told that needs to pull out withholding. I don't think this contradicts what we were

saying before.

THE COURT: It does contradict what was said. What you said is not consistent with what you're saying now. That's the trouble with these analyses. They are fine as far as they go, but they do not tell the story.

Anyway, there are, similarly, prescriptions, first item in Mr. Rubinstein's letter. I don't think that the item is prescriptions. I think the item is other and it included other matters such as bank processing, consultants, lawyers, and bookkeeping.

MR. EVERDELL: Your Honor, if I can just step back for one second and just talk about the general position of the government on loss, which is that unless it's specifically budgeted for -- that it has been preapproved in a budget or has had subsequent approval authority from NIST, or whatever expenditure it may be, that it's overbudget or an item in a category that is not a budgeted category, that constitutes a loss to the government. The reason why is --

THE COURT: It has to be -- it seems to me it has to be a loss as to which there was criminal intent.

MR. EVERDELL: Your Honor, I think --

THE COURT: In order for there to be an intentional misapplication of funds. You have to have criminal intent here. The fact that the government lost money on the grant or the money wasn't expended properly does not necessarily mean

that there was criminal intent involved in all those expenditures.

MR. EVERDELL: Your Honor, according to the guidelines, the guidelines commentary, when you're looking at government benefits, you are supposed to look at what the intended use for the money was. For loss amount you look at whatever was diverted to in unintended use. It's the government's position that with this money that was given out, it came with a lot of very specific spending rules and those rules were clear and set forth. So that is the intended use of the money.

We handled this money such that you would spend it in accordance with these rules and that included the budgetary rules, the prior approval rules, all of the other spending rules that came attached to the grant. So that when money is diverted elsewhere, when it is not part of an approved category or overbudgeted category, that's not an intended use of the money. That is not an intended use of the money because, otherwise, why not just give away the grant money with no rules and say, okay, here is a block of money for you to use as you see fit. We won't ask you how you're spending it. Come back in a year or so and tell us the progress you've made on your grant. I'm sure there are grants that probably do operate that way, but that's not this one. This one wanted to keep a very close leash on how this money was spent, they wanted to approve

everything that was spent and see all of the expenditures beforehand so that they were on board.

THE COURT: All the expenditures that were budgeted.

MR. EVERDELL: They wanted to see a budget first, yes, and anything that was not in that budget or over that budget, with the exception of the 10 percent rule that we are all familiar with, had to be approved. The reason why they do that is because, as defense counsel said many times in his own submissions, this is a type of grant where the government is actually very involved. So they want to keep a tight leash on how this money is spent.

Given that that is the posture of this grant, how the money is supposed to be spent, that is the intended use of the money, to be spent according to budgeted items or items that have been preapproved by NIST. So it's the government's position that when you go outside of those categories or go over budget on one of the approved categories, that still constitutes a loss to the government because they have not been able to exercise the control that they meant to exercise with instituting these grant rules and these spending rules.

THE COURT: Look. Let's go right to an item that bothers me, fringe benefits. They were approved at 34 percent of salary. No one said what constitutes a valid, as far as I could find in the papers in the court, what was a valid fringe benefit and what wasn't. How can I have any confidence that

not approved fringe benefits of $4,000 is something that is a willful disregard of the rules?

MR. EVERDELL: Your Honor, there are a couple of things with fringe benefits which is, I believe, how this was calculated. We heard testimony that there was no plan in place.

THE COURT: I heard that, but there was no plan in place from the beginning. You only found that out at a certain point. No one went and checked the group out or anything in advance. It says fringe benefits. The testimony is, he had a cafeteria plan or whatever it was.

MR. KWOK: Your Honor, if I may, I think the testimony --

THE COURT: And anything and everything could be expended in the way of fringe benefits to himself and members of the family and for the employees. The government may come back with, oh, it wasn't in the plan, so, therefore, it shouldn't be allowed, but there is no warning to the person there. I can't see the criminal intent there.

MR. KWOK: The defendant was certainly told repeatedly --

THE COURT: The government may have lost the money, but I can't see any criminal intent.

MR. KWOK: The intent is when he asked a question and was told no and went ahead and did it anyway. It was in the

documents --

THE COURT: He didn't ask any question about medical benefits, as far as I know, from the record.

MR. KWOK: If I could just address your Honor's question about amount. The amount reflected on this chart is simply the amount over budget because he took more salary because fringe benefits is a percentage of salary. So it's calculated as a fixed percentage of salary. So because he took more from CASI than the amount that he was allowed, namely, $175,000, the amount we just allowed him is an amount of $4,000 or so. It is simply an amount over budget because he took more in dollars --

THE COURT: He underspent budget through those fringe benefits by $4,000 it says right above it. Look at that. This is a mess.

MR. EVERDELL: Your Honor, I think we can make this much simpler. Let me see if I can do this. Even if you look at just the categories that were nonbudgeted categories, we are not talking about fringe benefits anymore, we are not talking about even equipment overexpenditures, we are not talking anything that was actually a budgeted category that had been at least somewhere approved by NIST before.

If we are talking about everything else, that is, rent, utilities, cleaning, meals, capital improvements, or these other expenses which were actually not listed in the

category other under the budget, we are already talking about for years one and two of the grant, we are already talking about a loss amount, under my calculation, is over $172,000. I think --

THE COURT: What figures did you use in the first year of the budget to get 172,000?

MR. EVERDELL: I just added up in years one and years two, so this would be 114 and 15.

THE COURT: Which items are you adding up?

MR. EVERDELL: I'm adding up rent, which is $60,000 in year one; I'm adding up utilities, which is 16,341 in year one. I'm adding up capital improvements.

THE COURT: Rent. You're adding up after rent what?

MR. EVERDELL: Rent was first, 60,000.

THE COURT: Utilities.

MR. EVERDELL: Utilities was second.

THE COURT: There was some testimony on utilities. He got an approval.

MR. EVERDELL: Your Honor, I don't think there was ever testimony that he got a prior approval for utilities. In fact, he was told repeatedly that utilities were not allowed.

THE COURT: The difference between the utilities for the apartment before and after the upgrade for air conditioning and for the machinery --

MR. EVERDELL: I think the only testimony we had on

the record is that he tried to get an approval for the utilities, but he never received one.

THE COURT: Mr. Rubinstein's quotes a utilities figure using Mr. Benedict's testimony at 1057. I can't find it. Here it is, 1057.

MR. EVERDELL: I'm looking at the page he cited. Here it just says -- his question is, this is Mr. Rubinstein's question, and he is questioning --

THE COURT: And the discussions were that if he could indicate the fact that there was an increase, that they could be classified as direct expenses, not indirect expenses.

MR. EVERDELL: It says the discussions were, right, that if he could demonstrate the fact that there was an increase, that they could be classified as direct expenses, not indirect expenses. But there was never any approval of this. So at this point none of the testimony here is talking about any approval of any additional utilities, expenses, or anything like that.

THE COURT: Sounds like approval, but not written approval.

MR. EVERDELL: He is talking to Bob Benedict. Bob Benedict, I think, is a witness here who is the finance manager. We are not talking to the people at NIST, who actually made the approval, such as Hope Snowden. If I recall correctly, Hope Snowden's testimony about utilities was simply

that there were lots of conversations that she had with the defendant himself and with others about whether or not grant funds could be used for utilities, and she said no.

THE COURT: Where is this?

MR. EVERDELL: The cites to the record?

THE COURT: Yes.

MR. EVERDELL: Your Honor, I'm afraid I don't have them --

THE COURT: This does say the witness summarizes his testimony at the end of the page. The incremental amount of additional expense caused by the grant could be classified as direct expense and not indirect expense. Direct expenses are allowed, regardless of what they are. Indirect expenses are not allowed.

MR. EVERDELL: I think that that quote just says right there that they are talking about a possibility, but a possibility that was never actually approved. And a possibility that was never actually budgeted. So --

THE COURT: It suggests not approved in writing. I have seen that. I agree with that. But it sounds as if it was approved orally.

MR. EVERDELL: I don't know if I read that as that. Maybe it's Mr. Benedict's understanding of what he could possibly get approved under the rules.

THE COURT: I think that's a little bit -- the point

is that the criminal intent of the defendant is important here. And if he was proceeding on that basis, that seems to me -- I have reason to -- it seems to me that that amount is an amount that should not be considered in the loss calculation.

MR. EVERDELL: Your Honor, I think I have to respectfully disagree with that. My colleague, Mr. Kwok, has pointed me to the part in the record. This is Hope Snowden's testimony on page 256 of the record where she is talking about her conversations with I believe it's Dr. Karron and Mr. Gurfein about expenses. And the question was:

What questions did he ask you, if any, during those conversations?

And the answer is: Was he allowed to pay for rent and utilities with the ATP federal-funded grant.

"Q. And rent for what, rent utilities for what?

"A. For the condo in which at this point, I guess, CASI, the company, was being housed.

"Q. And whose condo was that?

"A. Dr. Karron's condo.

"Q. What was your response to the question? Can rent and utilities be paid for with ATP funds?

"A. No. They are unallowable costs."

THE COURT: I understood that testimony. That comes well preceding Benedict's testimony, it comes well preceding the work for the apartment for the air conditioning, and that's

what caused the utilities to go up and that's after the time that Snowden is talking about, as far as I can see.

MR. EVERDELL: Let's just do this then, your Honor.

THE COURT: I've got to be --

MR. EVERDELL: Let's do this. Let's set aside for the moment the issue of whether that $4,595 should or should not be included in the loss amount.

THE COURT: According to Mr. Rubinstein, it's not 4,000.

MR. EVERDELL: I was looking at page 2 of his letter.

THE COURT: 16,341, as I understand it. The utilities prior were 4595, prior to the project.

MR. EVERDELL: I believe that's 16,341 is what the government is claiming is the utilities amount for year one.

THE COURT: Maybe you're right. That's the government's claim, not 16,000. He claims --

MR. EVERDELL: He claims that the loss is only 4,595, which is the amount of the increase, he says.

THE COURT: That's the prior amount of utilities, not the increase. The difference should be not a loss.

MR. EVERDELL: I apologize, your Honor. He's claiming the difference between the two should be not included in the loss.

But setting that aside for the moment, again, if you add up the categories again that were nonbudgeted expenses,

even leaving that issue aside, I guess let's just say that that is almost $12,000, not quite, of difference.

If you go to the next category, which is capital improvement, in year one is 11,248. Again, this has no -- there is nowhere in the budget where this stuff is talked about. There is no prior approval from NIST for this sort of thing. Mr. Benedict is using the money, same which he does for cleaning and meals, to do whatever he feels like he wants to do with it, and he's spending it on outside budget categories.

THE COURT: Let's deal with capital improvements. They claim that this should be more profited by the site preparation.

MR. EVERDELL: But even site preparation isn't a budgeted category.

THE COURT: I don't know that it is.

MR. EVERDELL: It's not, according to the exhibits. Basically, what the defense counsel has tried to do in this submission is take every possible expenditure that he can think and try to claim that if it had some tangential or arguable benefit to the research, then it can't be qualified as a loss. That simply can't be workable, your Honor, because almost every single expenditure has some benefit to the research. You just can't work that standard. It's unworkable.

So what we decided and what our loss calculation and theory is about is whether or not it's in budget because that

is clearly what the intended use of the money was. We give you this money so that you can spend it according to the rules, and they were very clear about that. There was lots of testimony about how the rules were supposed to be followed, how they explained the rules to them, how they had to adhere to their budget, and for good reason, and how they needed approvals for things that were outside of the budget.

So while I understand that certain things that the defendant is claiming may arguably have benefited the research in some way, that's simply not the standard we can work with, because then there would be no loss at all, it would seem like. Even meals. People have to eat in order to conduct research, but you can't spend federal grant money to do it. Yes, you need to clean things in order to have your house cleaned, but you can't spend federal grant money to do it. It has to be budgeted if you're going to do it that way.

Things like site improvement, capital improvement, whatever it is, things that may sound even arguably better than meals and cleaning in terms of how it might affect the research, it doesn't count because it's not budgeted. There is a good reason for that. The government needed to understand and approve all the expenditures related to the research, whether it was because it was in a budget or because someone came to them later and asked for approval for something that was outside of the budget.

THE COURT: Let's not quite put it that way because there is this 10 percent rule that they have got in there.

MR. EVERDELL: Yes, your Honor. If you look at 114 and 115, down at the bottom right-hand corner you see the pie chart at the bottom right-hand corner which has -- I don't know if you can see it.

THE COURT: I can see the pie chart.

MR. EVERDELL: The slice is the 10 percent. If you're inclined -- it's our argument that the 10 percent rule, the money still has to go from somewhere. Even if you are going to exclude the 10 percent from the calculation, it's still going to rise far above the level that I think your Honor is considering.

Not only that, 10 percent can't be used for new categories. I'm talking simply now about categories that are not in the budget. The 10 percent rule only applies to categories that are already in the budget, and you may reallocate funds within those preapproved categories.

So with respect to the money I'm talking to you about now, the ones that are not budgeted categories at all, the 10 percent rule does not even apply to that. So even if you add it up, all these out-of-budget, nonbudgeted categories, you would still get to a loss amount, under my calculation, over $172,000 in loss.

If your Honor subtracted the 12,000 or so from the

utilities, we are still over the 120,000 threshold and guidelines which makes it -- I believe, it's a level -- I want to check -- it bumps it down two levels from the calculation that's in the PSR. But it's still a total offense level of 18 as opposed to 20, using that calculation.

THE COURT: The PSR originally was more than 200,000.

MR. EVERDELL: Your Honor, we still think that the calculation in 114 and 115 is entirely correct. We actually think that is the loss that the government suffered. In fact, we are giving the defendant quite a bit of the benefit of the doubt because we are saying that everything within the budgeted category was a proper expense. It makes that assumption. And everything -- all we are saying is everything outside of that, either if it's a nonbudgeted category or something overspended on a budgeted category, represents a loss to the government.

However, if your Honor is not inclined to accept that, because of concerns you have about the calculations here, at the very least, if you look simply at the nonbudgeted categories, things that were not approved by NIST at all, which are those things that I mentioned before -- rent, utilities, capital improvement, cleaning, meals, and other -- then we have a loss amount that is at a minimum just two levels less than what's in the PSR.

THE COURT: You would agree that it should not be entitled to subscriptions as other expenses.

MR. EVERDELL: I apologize, your Honor. I miscalculated. It's not two levels less. It's actually four levels less. If you start with a base offense of 6 and the loss amount is more than 120,000, that adds 10 and you get 16.

MR. RUBINSTEIN: Your Honor, I think that the initial distinction is a question of what is allowable and what is allowable. And I think --

THE COURT: What is what?

MR. RUBINSTEIN: Allowable; in other words --

THE COURT: I know what allowable is.

MR. RUBINSTEIN: As opposed to what the budget says that was allowed. I say to your Honor that this money was not given to buy equipment, just to buy equipment, to get subcontractors, to have employees. This money was given for research. That was the purpose of the money.

I think that the government is using the budget in a way that it never was intended for the purposes of what a loss should be. Let's assume that Dr. Karron's spent the whole $800,000 on machinery. He wasn't budgeted for it, but he spent $800,000 for machinery for the project. He didn't take a salary, he didn't spend money on anything else and, lo and behold, the project ran the three years and he developed the science that the money was given for. Under that theory he could be prosecuted for $690,000 in misspent money.

The bottom line is, your Honor, the fact that they

come up with a category and then they say, we have a category here, capital improvements, the testimony is clear, uncontroverted, that these weren't capital improvements. They were site preparation and they devalued the apartment -- we had an expert -- a one bedroom apartment in Kips Bay selling for just over $500,000. Everyone who knows anything about the real estate market in New York City. That figure was devalued because it devalued, but they have a category. It's called capital improvements and we don't have a category in the budget. Therefore, not only whatever you spent, no matter what else you want to call it, we called it capital improvements. Did anybody call it capital improvements but the government? Now they say, it's capital improvement, not in the budget, therefore disallowed. I submit to your Honor, this is site preparation. Any reasonable, logical person would conclude --

THE COURT: The trouble is, in his application for the grant he said -- he gave the impression that they were up and running.

MR. RUBINSTEIN: They had equipment there.

THE COURT: As I understood it, active Web site, et cetera.

MR. RUBINSTEIN: They had a Web site.

THE COURT: And they had computer equipment.

MR. RUBINSTEIN: But they didn't have this kind of computer equipment, Judge. We are going back --

THE COURT: You don't need site improvement.

MR. RUBINSTEIN: They needed it here. The contractor testified what he did. He built things, he put up rackings for them to convert the living room into a computer lab.

THE COURT: The material was -- everything was in there. What he did was, as I understood it, was to improve the usability of the space.

MR. RUBINSTEIN: Not for an apartment.

THE COURT: Not something that was called for in the budget.

MR. RUBINSTEIN: It's not called for in the budget, I agree with you. It may come under the categories of others. It may come in here. But the question is --

THE COURT: Others is for audits. Other was the only thing -- the budget under other was audits, is my recollection.

MR. RUBINSTEIN: There was a budgeted category called audits, your Honor.

THE COURT: The only thing that was budgeted under others was audits, $10,000.

MR. RUBINSTEIN: If you look at 115, you'll see that in 115, next year, they disallowed the $10,000.

The bottom line is that the items that the prosecutors talked about, capital improvements, I submit, were not capital improvements. The meals, they have no breakdown of where the meals were, who the meals were for. If you recall Riley's

testimony, she went to lunch with Dr. Karron to talk about this investigation with other people from CASI, and she disallowed that lunch. Any business is going to charge a lunch like that. Dr. Karron spent on his Master Card -- he had three credit cards. The only card that he charged meals on that were deducted were on the American Express CASI card. His own card and the Master Card is in evidence. He never deducted.

To suggest that there is not a category of meals, there is travel. There is travel -- does travel include meals when you travel? That's why when we broke down, your Honor, the subscription, we told you what those were. They had nothing to do -- you sort of have the category, you were thinking of some magazines like Sports Illustrated. This is for research for access to research for the projects. So you subscribe to a service to get your scientific data.

THE COURT: The big item that Mr. Everdell was saying, just, look, take the ones that aren't within the budget, the nonbudgeted items, and add them up and giving you credit for the utilities amount, so you have an $11,000 credit, as I understand it. You still have 11,000 under utilities or maybe 12, 12,000.

MR. RUBINSTEIN: It would be almost 5,000 under utilities --

THE COURT: You save that, so to the extent, instead it would be 5,000. What about the other entry, the rent entry?

MR. RUBINSTEIN: Clearly, he was not entitled to the rent, your Honor, so that's $60,000.

THE COURT: Then you add the other two then --

MR. RUBINSTEIN: What do you add two with, Judge?

THE COURT: $43,000 spent.

MR. RUBINSTEIN: For subscriptions?

THE COURT: No. For bookkeeping, auto expense, blank processing, consultants, lawyers, dues, prescriptions.

MR. RUBINSTEIN: That he's allowed. Subcontractors.

MR. EVERDELL: Your Honor, I think that the defense counsel is saying it's allowed simply because it is listed under the category other, but, as your Honor pointed out, in the budget, the only thing that the company listed for its other expenses was the audit.

THE COURT: You got this 80,000 figure that you can move around. But that seems to me is already taken care of when you look at the overdrawn equipment and the overdrawn materials and supplies. That takes care of the 80,000 pretty well.

MR. RUBINSTEIN: But those were budgeted items, your Honor, that went back to the intent theory. If they were budgeted items and he had no criminal intent -- he intended to misappropriate. We concede that. He spent over the budget. But did he criminally intend to misappropriate that amount?

THE COURT: He didn't spend much over the total amount

because he took out the 836,5 plus $1300, apparently, the first year. It's these expenditures in the other category that --

MR. RUBINSTEIN: If you have 60,000 for the rent, you have 11,000 for the -- you have 5,000 for the utilities. That's 65,000 in the first year for the utilities. I submit that the capital improvements are not -- are a legitimate expense. The cleaning is questionable. Even though I think that it's arguable on defendant's side, I won't contest the cleaning.

THE COURT: It's an appropriate expense. He should have gotten approval for it.

MR. RUBINSTEIN: That is the point. The point is, if he didn't get approval, we know that the rent -- he was turned down and he still took the rent. We know that that is an amount that he took that he wasn't entitled to.

But as to other items that were for the benefit of the research, it doesn't seem that the guidelines, when you look at the loss factors and how to consider loss and you consider government benefits, I think even though they don't have the specific illustration, the government can't cite one grant case where there was a misappropriation.

The problem here is that, what was the government's benefit? They gave money for a research project. It's unquestionable that's all they did was research. The only monies he put in his pocket were the rent monies.

THE COURT: The problem is that CASI, he did own CASI, as I understood it, he and his family, I guess. You can misapply money not just for your benefit, but you can misapply money for the corporation's benefit.

MR. RUBINSTEIN: Right.

THE COURT: The trouble with capital improvements, yes, it probably was not to his personal benefit because the apartment probably was worth more unimproved than it was containing those improvements, but it would be beneficial to CASI as a computer center, research computer center, to have the improvements made. That's the problem. That would still not be the research contemplated by the grant.

MR. RUBINSTEIN: I still don't see where they get their figure that they are claiming --

THE COURT: I don't see the capital improvements. I didn't realize the amount was $37,000.

MR. RUBINSTEIN: When the apartment was sold they had to rip out all that stuff for the new owner.

THE COURT: That's what I was referring to earlier.

What kind of a figure do you come up with, Mr. Rubinstein?

MR. RUBINSTEIN: In the first year, 60,000 for rent, 5,000 for utilities. I'm rounding off. 2,000 for meals and 67,000 in the first year. Questionable capital improvements or site preparation, which would probably go under equipment. And

the --

MR. KWOK: Can we have the amount on that?

MR. RUBINSTEIN: For capital improvements?

MR. EVERDELL: The thing you just cited.

MR. RUBINSTEIN: I said 2,000 for meals, 5,000 for utilities, 60,000 for rent. Second year, there is 2,000 for rent, 5,000 for utilities. Meals, the second year, rounded off to $1500. I'm sorry. Meals. $3,000. That would make it $77,000 without capital improvements. If you gave the whole capital improvements, which I don't see how you can do that for the two years, you're talking about 20. We don't concede this. We are talking about 31,000 over there.

So in a worst-case scenario it would be 108,000, but I submit to your Honor that I don't see why capital improvements should be considered as a nonbudgeted item when it clearly was used in order to facilitate -- you couldn't put those big computers in that apartment without site preparation. You wouldn't do it without having the shades to keep the heat out, without having extra wiring to get the electricity needed for the place. These are things that are totally unrelated to what anybody would consider a capital improvement.

THE COURT: Part of the problem here is that the site was changed from NYU to apartment. With NYU you had free space and a place for the computers. When that fell down, he switched to the apartment. But the budget doesn't change in a

material way, I believe, between the two budgets. I think it should have.

MR. RUBINSTEIN: Judge, I just feel that looking at Judge Rakoff's decision in Adelstein -- Adelson, rather, and in other decisions that I've seen, including Judge Block's decision out of the Eastern District --

THE COURT: It's not in your memo.

MR. RUBINSTEIN: I know. Because I'll give you the citations, your Honor. Judge Rakoff is 441 F.Supp.2d 506. Judge Block's decision citing Judge Rakoff's decision is a Westlaw citation of 354151 and a -- and they talk about -- those cases were primarily stock cases. They talk about that the fraud guidelines -- because the numbers increase so much that they give a distorted view of what a reasonable sentence should be.

In both of those cases -- I'm not even up to that point because first we have to have a guideline analysis before we get to the questions of downward departure or 3553 considerations. I think what the Court is trying to decide now in its analysis is, first, doing what the guideline calculation is required to do, before you determine whether or not you want to give a guidelines sentence or a nonguidelines sentence. I think that for the purposes of a guideline analysis, I think that a figure of between 70,000 and 120,000 for guideline purposes, analysis purpose, that that would be an appropriate

range, 70,000 to 120,000 without --

MR. KWOK: Your Honor, if I may, even taking just the items Mr. Rubinstein talked about, the rent, utilities, meals. Utilities, by the way, just the difference, not the whole thing, we are up to $100,000 already. And then if you look at Government Exhibit 115, year two, the category under other, which includes all manners of things like bookkeeping, auto expense, bank processing, consultants, lawyers, dues, subscriptions, that alone is $31,000. If you add that category alone to all the stuff that Mr. Rubinstein just conceded, we are already over $120,000, which puts us at level 16.

MR. RUBINSTEIN: I didn't concede that. There is no breakdown of what they are talking about. They give you bookkeeping auto expenses, which I assume relate to travel, bank processing consultants is budgeted for 250,000 -- rather, he is budgeted for $110,000 in subcontractors, which I guess are consultants. He spends only 6,000 of that, and they throw in consultants, dues, subscriptions into a category. Then they want to say, that's $31,000. I submit to your Honor, that nobody from that chart or from the 110 backup could say how they ever arrived at this number. Then they want to arbitrarily plug it in and say, no, look at that, we have arrived at the next level.

THE COURT: I'm looking where those figures must have come from. I think if you look at 110, 111, we can probably

determine --

MR. KWOK: For example, your Honor, you can look at Government Exhibit 110, page 17 of 37. That, for example, lists all the gas payments, all her expenses. That's where it came from. That's just one example.

THE COURT: Mr. Spring is bookkeeper. That's what Kim Jackson is for Sprint.

MR. KWOK: That's right.

THE COURT: The sole purpose, as I understood the testimony, and I may be wrong, for Mr. Spring to be employed was to get the books in order for the other. They had another bookkeeper, as I understood it, but I may be wrong, who could take entries for bookkeeping, but wasn't skilled enough for interpreting what should be in the company's expenses and what should be personal expenses, and what should be reasonable expenses. Is that correct?

MR. EVERDELL: Your Honor, I think Mr. Spring, in addition with helping with the audits, also stayed on to do additional bookkeeping work for the company even after the audit was over.

THE COURT: I thought it was all computerized.

MR. EVERDELL: I misspoke.

In addition to help preparing the books for the upcoming audit, he also conducted some regular bookkeeping activities for the company. Even so, you have $10,000 budgeted

for the audit and you went over that $10,000 by the amounts in other, which includes the overage, includes some of the Frank Springs expenses, but it also includes some things like auto expenses.

THE COURT: But you are allowed the $80,000, but then the $80,000 has been used up.

MR. EVERDELL: By equipment or any other number of categories, yes, your Honor.

It's the government's position that at the very least that this money should be counted as a loss. It's nonbudgeted and it's completely absent from the budgets that were submitted, and was money spent with ATP grant money.

Let's also not lose sight of the fact that it was very clear from the budget rules or from the ATP rules that indirect costs are not covered, and that was made very clear to the defendant at all the premeetings before he started the grant.

Yes, certain things -- research can't happen without lots of things being bought, lots of things being improved, all this stuff. But it doesn't mean that you can use ATP grant funds to spend on that stuff. You have to follow the rules.

So these expenses -- I think, just looking at the spreadsheet that Ms. Riley prepared, you can see how they are itemized out here, at least the other category.

THE COURT: Is Peter Ross an employee or was he a consultant?

MR. EVERDELL: Peter Ross, your Honor? I don't think I know where you're looking, your Honor. I see.

Your Honor, I think that Dr. Karron chose to pay Peter Ross as a consultant. Even so, what we are talking about here, that's a $15 charge.

THE COURT: What charge?

MR. EVERDELL: I thought you were talking about the Peter Ross parking charge.

THE COURT: Yes.

MR. EVERDELL: Reimbursement to Peter Ross is a $43 charge.

We are talking about very small numbers here. Under the guidelines, as it says in the commentary, the Court need only make a reasonable estimate of the loss. And I think when you consider all these categories that we are talking about and the fact that it is backed up on the paper here, that we are in the range, at least, of 120,000, given what Mr. Rubinstein has just told your Honor and the very small difference that seems to exist at this point.

The categories that are nonbudgeted categories should be counted, and that bumps us into the $120,000 range without much trouble at all. Given that your Honor doesn't have to come to an exact dollar amount of loss, the minor discrepancies, to the extent they even exist, shouldn't deter your Honor from coming to that larger loss amount because I

think the clear, logical way to read the evidence is that there are lot of nonbudgeted categories and they are backed up by the spreadsheet analysis, and that these should be considered as loss to the government because they were not approved, as the defendant knew he needed.

THE COURT: Brings me back to the question --

MR. RUBINSTEIN: The problem is, Judge, when you go to the backup that they throw out there, 110, and you find that the bank charges are under $336 --

THE COURT: What page are you on?

MR. RUBINSTEIN: We have a gas expense on page 17 of 37 of $1,189.68. We then have --

THE COURT: I missed the page.

MR. RUBINSTEIN: Page 17 of 37. We know that Dr. Karron was traveling to Washington, D.C. and to New Jersey as part of his work on this research, but let's take the whole figure. Next they have -- let's assume she put in -- the parking, $67, that's on 18 of 37. Then they have bank processing on 18 of 37 of $336. If you add up lawyers they have on 21 of 37 $1,173.75. And I submit that's questionable because I think those lawyers were patent lawyers related to securing intellectual property that they were allowed to do. Then it says dues and subscriptions under that. They have $198.

I'm looking for the -- they have that bookkeeping

figure out. I don't think it is appropriate, but they have a bookkeeping -- I don't know who that included, but let's leave the bookkeeping out of it. We are talking about under $3,000, in my quick math, of expenses. And then they tell you that the category calls for $31,000, but their thing is 31 thousand 8 or 625, depending on your eyesight. How that's broken down, whether or not these are appropriate expenses, then they say, let's plug in this additional $31,000. I submit to your Honor that would be inappropriate.

MR. EVERDELL: Your Honor, let me address -- for example, there is a specific issue with the lawyers. Pennie & Edmonds, patent attorneys, it was my understanding that this was incurred before the grant even started. And these charges for lawyers are specifically prohibited by the grant rules.

Was Mr. Karron told this? No. Because he never actually tried to budget it as an item. Had he tried to budget it, he would have been told specifically that he couldn't use grant money to do this.

Again, we are faced with this argument that if it arguably somehow benefits the research, it should not be covered at the loss. The government submits that that is simply unworkable. What we have to work with is what was budgeted and what was approved by NIST, and anything that wasn't is a loss to the government.

Not only that, your Honor, we are talking at least --

now we seem to be talking about the difference of maybe $10,000 between two thresholds in the guidelines. The defendant's calculation that he gave you a few moments ago doesn't even include the cleaning expenses, and that's several thousand dollars two years in a row. And that I just don't see the argument there. Again, the only argument could be, as he said in his papers, was that you need to clean in order to make the computers work. That simply doesn't hold water.

This is an indirect expense, something that is disallowed by the grant and was never budgeted and never approved. That is a loss to the government. It was money that was spent in contravention of clear rules that were set out governing the grant fund.

So given the fact that we are literally arguing now about a couple thousand dollars here and there, and I believe -- we could sit here and tally up all of these nonbudgeted expenses. I guarantee you, we would be over the 120,000 dollar mark without any trouble whatsoever.

THE COURT: What's the applicable note that we apply here to losses?

MR. EVERDELL: Your Honor, there are a few. One is the estimation of loss, which just says -- that's 3A -- 3C, which says that the Court need only make a reasonable estimate of the loss, but also the special rules.

THE COURT: You're looking in the commentary.

MR. EVERDELL: I'm looking at the commentary, yes, your Honor.

Commentary 3, which is loss under subsection B1 and then 3C, estimation of loss, said: The Court need only make a reasonable estimate of the loss. And the Court's loss determination is entitled to appropriate deference. And then if you look at F, which are the special rules --

THE COURT: I just want to see one second because I have trouble, I guess, in determining whether or not it should be loss to the government or misappropriation.

MR. RUBINSTEIN: There is another basis --

THE COURT: Intentional misappropriation by the defendant. It seems to me it should be intentional misappropriation by the defendant.

MR. EVERDELL: An intentional misappropriation, your Honor, would include the fact that he was told that he needed to submit all of these charges in his budget and get prior approval for them.

THE COURT: The fraud and deceit element is somewhat lacking.

MR. EVERDELL: Your Honor, as you, I think, pointed out earlier, the case law shows that you can have a misappropriations case even if the expenditures arguably benefited the company. That's the Urlacher case.

THE COURT: Isn't this application to the benefit of

the defendant, or third party?

MR. EVERDELL: Or to the defendant.

THE COURT: That's under one of these guidelines. Which is it?

MR. RUBINSTEIN: No, it's not, Judge. That is for the purposes of guilt. We are talking now for guideline purposes determining the loss, which I suggest is a different analysis. I think your Honor should be directed to 2B1.1, 3B, where it says gain. This is an alternate method for the Court to use.

THE COURT: Let me find you, where you are. 3B. Now you're going to the commentary.

MR. RUBINSTEIN: I'm in the commentary, Judge. 3B says gain. The Court shall use the gain that resulted from the offense as an alternative measure of loss only if there is a loss, but it reasonably cannot be determined. And I submit to your Honor that under these circumstances you cannot reasonably determine what the loss is, so you should look at the gained factor which in this case would result in looking at the rent, the $62,000; the utilities; cleaning, if you want; meals, and you would be just over $70,000. I think that is the appropriate analysis here before you consider any credits or offsets. But first we have to arrive at what is an appropriate figure. Obviously, the guideline considers the fact of what someone actually puts in their pocket for personal benefits.

MR. EVERDELL: Your Honor, I have not looked at the

case law on this recently and it was not cited in any submission by Mr. Rubinstein, but I think the loss can be reasonably determined based on the numbers set forth by the government. I don't think we need to rely on any alternative method of loss because we can determine what the government lost as a result of all of this.

I think, if I remember correctly, the cases where you talked about alternative loss calculations is where the victims -- there are so many victims and the calculation involved things like stocks and how the value of stocks go up and down and how that's very hard to estimate. Here we are talking about hard numbers. We know what grant money went to the defendant and we know what he spent it on. The question for your Honor to consider is which of these expenditures are you consider as a loss to the government and which are not.

THE COURT: Insofar as the misapplication involved fraud, then I think you used loss. Insofar as the misapplication is intentional -- this application seems to be a different definition of intended. Then it seems to me to use the gain to the defendant or a third party. But I can't see where I am in the guideline notice. I don't see that it really applies under the guideline notes. So what I just said isn't supported by the guideline notes.

MR. RUBINSTEIN: What's that, your Honor? I missed that.

THE COURT: What I just said isn't supported by the guideline notes, as I see it.

MR. RUBINSTEIN: What's that, your Honor?

THE COURT: I gather that you only apply gain to an intended misapplication, you apply loss to a fraud case if it's done by a fraud. Then you apply loss. My problem from the beginning here has been that distinction. I am not sure you apply loss here.

MR. EVERDELL: Your Honor, the commentary that the government was following was actually -- in combination with a reasonable estimate was the 3F special rules.

THE COURT: Let me look at the rules.

MR. EVERDELL: 3F2, government benefits, which is also the section that was cited by the defendant in his letter, which says: In a case involving government benefits, e.g. grants --

THE COURT: It says: Subject to the exclusion and subdivision if the loss is the greater of actual loss and intended loss. In a sense, the whole thing, the whole agreement was a loss to the government.

MR. EVERDELL: Yes, your Honor. In fact, the defendant never even did his cost share, as we know, and was essentially not entitled to any of the grant money that he spent.

THE COURT: There was his contribution later, wasn't

there some money?

MR. EVERDELL: I think after the grant was suspended there was a contribution by the defendant.

THE COURT: That went to outstanding bills.

MR. RUBINSTEIN: That money was probably extended. That's the whole purpose. It increases your budget.

MR. EVERDELL: Your Honor, the government told the defendant that in order to comply with the cost share he had to make payments to the government and that's the payment that was made, but I believe this was after --

THE COURT: That's more than the cost share --

MR. EVERDELL: I'm sorry. He did not make that payment.

THE COURT: The $70,000.

MR. EVERDELL: You are talking about the $70,000 loan --

THE COURT: There is some statement in these papers that he gave 70,000 after the closing period.

MR. EVERDELL: That $70,000, which I believe Mr. Rubinstein was saying was done between July 27 -- June 27 of 2003 and August of 2003 was after the suspension.

THE COURT: What was that used for?

MR. EVERDELL: One moment, your Honor.

Your Honor, I believe my understanding is there were outstanding invoices at the time that the $70,000 was used to

pay the outstanding invoices. It was not actually used to pay the government any of the cost share amount. So that didn't translate --

MR. RUBINSTEIN: You never pay the government the cost share. You put the money in so you take the money out and spend it. That's the concept. The money --

THE COURT: It doesn't go to the government. It goes to the budgeted items during the period of the grant. Before it was suspended --

MR. EVERDELL: I think that is the point, your Honor. It wasn't before the grant was suspended. The grant was suspended on June 27, 2003.

THE COURT: To keep CASI going.

MR. EVERDELL: But under the guideline rules, if the fraud, if the misappropriation is discovered by a government agency, that is the point at which you start -- you cut off people from getting credit from payments they make later. And as I think I outlined in the government's letter to the Court, that date predates the suspension date because we had testimony from Hope Snowden who testified that when she was getting revised budget submissions at the end of 2002 and the beginning of 2003, she noticed there were serious discrepancies in the budget numbers and that raised red flags to her that there may be some problem with the appropriation of these funds and that led to them calling it off.

THE COURT: I think that's covered in my opinion.

MR. EVERDELL: That is the date of discovery and the defendant is, in fact, not entitled to a credit for any funds he may have given back at that point because the misappropriation was discovered.

MR. RUBINSTEIN: That's not, your Honor -- I'll take a look at your opinion. That's not the date of the discovery from the standpoint that the defendant put monies back because he thought that it was discovered he did something wrong. The bottom line is, he didn't think he did anything wrong. That's the whole concept of the discovery is that we don't want somebody to run back and put money in after they find out that their theft has been discovered.

This is a misappropriation case and he did not feel -- he was a he then -- that he had done anything wrong. And it's his mental process, not their mental process, because the whole concept is, hey, if you get caught stealing, at that point, when you give it back, it's not the same as if you did this voluntarily because you realized you did something wrong and you wanted to make amends before it was detected. So I think that they have the wrong person that has to be aware of when there is something wrong here.

THE COURT: I see that this section, subsection of the commentary, subsection II says, in a case involving government benefits, entitlement program payments, losses shall be

considered to be something obtained from unintended recipients or diverted to unintended uses. The problem I'm having is that there is more than one statute -- the statute deals in terms of fraud in one case and intentional misapplication in another. And it does seem to me that benefits obtained by unintended recipients deals with intentional misapplication of funds diverted to unintended uses. The second part of this note to the guidelines is more difficult to apply in intentional misapplication of funds in terms of showing that it was an intentional misapplication. All the evidence in the case kind of shows that when confronted with misapplying the funds, he would say things like, my mother has got the money or something else, I'm working on it, they are going to come along, and the ladies down there at the program love me and everything is going to be all right. Never does he make a statement, at least to these parties, the hell with rules, I'm taking the money. They owe it to me for my research.

I find it difficult to apply the guidelines in this case. Maybe the guidelines make it a situation that didn't occur to the drafters of the guidelines. It's not the usual case, as I understand it.

Are there other cases of this sort that either party is relying on involving the intentional misapplication -- are there other cases involving the intentional misapplication of funds as opposed to fraud, embezzlement?

MR. EVERDELL: I looked for some cases that talked about loss amount in sentencing. I didn't find anything very helpful in that regard. What I was going with was literally what I got from the guidelines.

But I still don't know why it's difficult to apply diverted to unintended uses in this case, that prong of the guidelines, special rules for government benefits, because that seems to me to be the definition of misapplication. You're taking funds and applying them for unintended uses, unintended in this case by the people who gave out the grant money, NIST. And unintended in the sense that they gave out the money with lots of rules attached to it, that they made clear to the grant recipients and those were the intended uses of money, that is, expenditures that followed the grant spending rules. And anything that did not follow the grant spending rules was an unintended use of that grant money. I think that was made very clear to the defendant in this case and, from the testimony, to all grant recipients, that things like the kickoff meeting and other things like that. I think that is actually the appropriate part of the guidelines to be applying in this case, that the money that was spent, contrary to grant spending rules, was diverted for an unintended use and that that constitutes a loss.

Now, your Honor raised some difficulties you had with the calculations for certain things and whether overbudget

expenses should count or should not. We have, at least, I think, provided a more simplistic and one that benefits the defendant way of thinking about this, which is just looking at the unbudgeted categories. Those are clearly cases, money that was spent contrary to the grant rules because there was absolutely nothing in the budget that spoke to it. These are monies that were expended without any reference to the grant rules whatsoever.

Now, defendant can argue that these things arguably benefited the research in some way. Perhaps they did, but that's not the standard that we need to operate with because that would sweep in every single expenditure. There would be no loss in any of these types of cases if that's the way we have to look at it. If you look at the unbudgeted categories and you apply to unintended uses, being diverted contrary to the grant rules, that provides a framework for the loss amount that's appropriate in this case.

MR. RUBINSTEIN: Your Honor, I think that this case is outside the heartland because I don't think anybody envisioned a case where somebody got a grant, spent all their time and energy on that grant, bought equipment in furtherance of the grant. There is no suggestion here. As a matter of fact, Lide even testified that Dr. Karron met all the benchmarks, and your Honor said something that I have to take opposition to, suggesting that nothing came of this research.

THE COURT: No. Saying that the project wasn't completed, so I suppose that they didn't get their money's worth in that sense.

MR. RUBINSTEIN: No. Because the government gets their money's worth since they didn't have a financial benefit, no matter what, and that the whole concept was that if something was developed, Dr. Karron and CASI would keep all the profits for themselves. Society would benefit. They were doing research on a cutting edge. We have to go back seven years ago. Now it's commonplace. But they were dealing with the concept of -- I hope I pronounce this right -- topological imaging that they use today in many medical factions.

I submit to the Court and the government a paper that was submitted for publication, citing work that was submitted to a medical journal, citing this work because, in fact, that was the whole purpose of this research. That's why the grant was given, to develop this concept, at a time where they use computers half the size of this room. Today they probably could use a laptop and get the same information. I know I have it here. Just a second, your Honor.

THE COURT: I'm not taking issue with that, Mr. Rubinstein. I am not taking issue with that. It never came to fruition with the commercialization of the process, as far as I know.

MR. RUBINSTEIN: They are talking about the amount

that Dr. Karron received and the figure that we started out with from -- as to salary, it seemed to me that that figure, as I cited in my submission of October 17, on page 3 -- first of all, they have 129,850 in loans. This is at 110, Government Exhibit 110, 38 through 40 of 44, the second portion of 110. They show 129,850 loans to Dr. Karron. We dispute one, and I have backup for it, a $750 check that was really for Scott Alba that was advanced from defendant out of his own money. Then December 30, '02, 15,000 check that's for reimbursement. Doesn't say anywhere on that check where it says loan, we reduced those numbers.

THE COURT: Why do you say that shouldn't be --

MR. RUBINSTEIN: Because that was a partial reimbursement. There is nothing on that check --

THE COURT: If he writes a check and it says partial reimbursement on it, isn't that reimbursement for loans taken?

MR. RUBINSTEIN: It's partial reimbursement because the medical expenses that were on the credit cards --

THE COURT: What's partial reimbursement of expenses taken? I don't know what you're talking about.

MR. RUBINSTEIN: Out-of-pocket expenses that he paid on the MasterCard that's in evidence. They never give him credit for the monies that we have the documentation that we submitted to the Court, and I have additional documentation showing -- not only showing that these bookkeeping entries gave

back 67 -- $75,000 that was given back by salary paychecks that he never gets credit for. It seems to me when they came up with the figure that they used for his salary, they included the 60,000 of rent. I mean, they have never said --

THE COURT: I don't think it did.

MR. RUBINSTEIN: If you look at pages 38 through 40 of Exhibit 110, the one that ends in 44 --

THE COURT: 1 and --

MR. RUBINSTEIN: The second half of 110 has 38 of 44. The beginning part says --

THE COURT: 38 of 44, yes.

MR. RUBINSTEIN: We have 38 of 44, 39 of 44, 40 of 44. It starts out on the top of 38 saying, Dr. Karron's loans. I have the check that I submitted as part of it on the $15,000 loan. It doesn't say anything about loan. Here she puts DPK loan, but there is nothing on the check to indicate loan. There are other checks that do say loan. So why --

THE COURT: Which one is that?

MR. RUBINSTEIN: Just above the line for loan repay.

THE COURT: I see it. I see that.

MR. RUBINSTEIN: This is 9/12/02, check 10451, it's written to Dr. Karron.

THE COURT: Can I see the check?

MR. RUBINSTEIN: Yes, your Honor.

THE COURT: It's a check payable to Dr. Karron. It

says something. It's deposited. It isn't salary. Why isn't it a loan?

MR. RUBINSTEIN: Why is it a loan? It's a reimbursement. It doesn't say anywhere what it is, but they classified it as a loan.

THE COURT: I would, too, if I see it paid to him.

MR. RUBINSTEIN: They have other checks, your Honor, where it says loan on it.

THE COURT: Where does it show as reimbursement?

MR. RUBINSTEIN: It doesn't show on that check. We understand it's on the check stub.

THE COURT: Reimbursement for what? It's a round sum. It sounds rather strange to be a reimbursement.

MR. RUBINSTEIN: This comes out of the Quick Books, you will recall, your Honor, the computer-generated software that they had, so it's in that software.

THE COURT: For 15,000 round dollars?

MR. RUBINSTEIN: You have to have an invoice --

THE COURT: You never have a reimbursement like that.

MR. RUBINSTEIN: He had a number of items. He took 15,000 --

THE COURT: It just happens to add up to 15,000. It's very strange. Let's see the backup.

MR. RUBINSTEIN: Your Honor, if you can give us a short recess. Dr. Karron came with the computer. He forgot to

bring the power supply. We could generate it right here. We have it in the computer. If he can recess --

THE COURT: Doesn't show rent, does it?

MR. RUBINSTEIN: Yes. He has everything in the computer in the Quick Books that are in the computer. We don't need --

THE COURT: This doesn't show that the amounts taken for rent were part of the salary computation.

MR. RUBINSTEIN: What I'm saying, Judge, I was trying to add up the numbers to get to her number. And the only way I could do that was by throwing in the 60,000 for salary so that if, in fact, his salary is accurate, which he has --

THE COURT: I've got to get this sentence completed. We can take a five-minute recess, if that's what you want. Take a five-minute recess then, but I don't think it's going to make much difference.

MR. RUBINSTEIN: All right, Judge.

(Recess)

THE COURT: Mr. Rubinstein.

MR. RUBINSTEIN: Your Honor, Dr. Karron purchased the necessary part -- actually, I gave him my credit card -- and the machine is booting up. We should have it momentarily.

MR. KWOK: Your Honor, while we are waiting, if the Court pleases, we could go to talk about the 3553(a) factors, which is another major factor.

THE COURT: I want to deal with the computation. Then we can deal with the 3553(a) factors.

When will you be ready, Mr. Rubinstein?

MR. RUBINSTEIN: Your Honor, do you have a computer screen that we can plug into to show you that would be more efficient to show you?

THE COURT: No, I don't have one here.

MR. KWOK: Your Honor, just to save time on this, I think that what they are trying to print out is the Quick Books ledger, which is not in evidence, which is not authenticated, which is a document that witness after witness have testified --

THE COURT: I don't know what he's trying to print out.

MR. RUBINSTEIN: It doesn't have to be in evidence for the purposes of sentencing, your Honor.

THE COURT: What are you trying to print out?

MR. RUBINSTEIN: We are trying to print out the backup to that $15,000 check to show your Honor that, in fact, that is not a loan; was, in fact, a reimbursement.

THE COURT: I am not going to make the findings on that issue. I am going to make the findings on the basis that Mr. Everdell suggested. And taking the amounts in the other categories that are not included in the budget and making the adjustments he talked about, giving the defendant credit for

the utilities and all. It seems to me that the amount of the loss, pursuant to guideline 2B1.1, is more than $120,000.

Isn't that your correct conclusion, Mr. Everdell?

MR. EVERDELL: Yes, your Honor, that's correct, more than 120,000 adding ten points to a base offense of 6.

THE COURT: I think that's borne out by the figures with adjustments that you pointed out, Mr. Rubinstein, as the total loss to the -- which should be computed, intended loss which should be included for guideline calculation purposes, which makes a total loss of 16 levels.

MR. RUBINSTEIN: Your Honor, I think your Honor has to consider the credits against whatever loss your Honor has --

THE COURT: I don't think there are any credits --

MR. RUBINSTEIN: Your Honor, I submit that under the -- that the amount of salary that they have calculated is not supported by any documentation they submitted.

THE COURT: In that tabulation I agree with you, that the entry includes salary and loans as they calculated it, but it doesn't make much difference because the 80,000 odd dollars that the defendant was entitled to redistribute are incorporated in the equipment --

MR. RUBINSTEIN: I submit, your Honor, under their figures --

THE COURT: Other entries.

MR. RUBINSTEIN: I submit under their figures, Judge,

that they have added back the $60,000 rent. If you take a look --

THE COURT: There is no showing of that.

MR. RUBINSTEIN: There is, Judge. They have not shown you at all where they get the figure that they have in 114. And I submit the only backup is on page 38, 39, and 40 of Exhibit 110 of 44 pages. And the only thing they have there is a loan which they claim is $129,000, repayment is 37,000. Taking their best figures --

THE COURT: You haven't gotten any salary --

MR. RUBINSTEIN: Salary of 37,000 -- of, rather, 35,000, and you have to add the $60,000.

THE COURT: I've got to take into account on the salary the figures that apply to withholding taxes, et cetera.

MR. RUBINSTEIN: Yes. I don't disagree with that, Judge, but I submit that they have a $129,000 in a loan and they don't show the repayment of the 67,000.

THE COURT: Repayment is right below it.

MR. RUBINSTEIN: No. They don't include it there. The two checks that I submitted to the Court that I have copies of with the backup showing --

THE COURT: Those checks are after the close of the period and were for, as I understand it, expenses incurred thereafter.

MR. RUBINSTEIN: No, your Honor. We are talking about

two separate things. We are talking about, one is the salary that is submitted in our letter of the 17th where we provide to the Court check of August 2, '02, a year before the grant was suspended, actually ten months before the grant was suspended where you have -- that's in evidence --

THE COURT: Where are you reading?

MR. RUBINSTEIN: I'm looking at our letter of October 17, your Honor. And I am showing you what was previously marked as Defendant's P6 in evidence, which shows --

THE COURT: You'll have to show me and you'll have to show Mr. Kwok.

MR. RUBINSTEIN: Mr. Kwok has the page. He has turned to it.

THE COURT: $5,000 check?

MR. RUBINSTEIN: Yes, your Honor.

THE COURT: That shows the defendant had taken $61,918 in salary just below it.

MR. RUBINSTEIN: Right. And that --

THE COURT: 61,000 plus 129,000. If that's the government's figure, adds to more than $200,000, right?

MR. RUBINSTEIN: No, your Honor.

THE COURT: $187,000.

MR. RUBINSTEIN: The Court is commingling two different concepts. One is they claim there is a loan outstanding that they never gave him credit for anywhere of

$75,000 that was taken in October of 2001. I think the date was October 25 or 26 of 2001.

THE COURT: That's what the loan advances.

MR. RUBINSTEIN: It doesn't show the offset of that loan. What I'm showing your Honor is --

THE COURT: I know you had offsets for the loan. I have given you credit for that and I have gone over your figures in your letter and I've made calculations on the basis of it. It shows me that there is still a net payment due the government on loans.

MR. RUBINSTEIN: But when you add that together with the salary, it shows that Dr. Karron did not get his full salary.

THE COURT: I agree he didn't.

MR. RUBINSTEIN: So he should have an offset under guideline 2B1.1(3)(e) for credit against loss for services rendered. He rendered the services, he was entitled to full salary.

THE COURT: He got it in the form of loans.

MR. RUBINSTEIN: I submit, Judge, that it doesn't compute -- that the loan calculation does not compute to what they are saying and I submitted in my letter --

THE COURT: He got it in the form of loans. It's very simple.

MR. RUBINSTEIN: Your Honor, in my letter I showed the

Court --

THE COURT: If you take the money from the corporation in loans --

MR. RUBINSTEIN: He took loans, but he paid it back out of these salary --

THE COURT: In part --

MR. RUBINSTEIN: In part. So that left, your Honor, a balance in a worst case -- in a best-case scenario for the government of $24,765.81, and you have to add to that the 60,000 from the rent.

THE COURT: No, you don't. Add to it?

MR. RUBINSTEIN: They did, though. They have never submitted how they arrived at their figure of the 200,488 in the chart, 114.

THE COURT: All I have to do is use my best judgment on the figures that are here. I exercised them and I have read your papers and I've taken them under account and I have somewhat struggled with them, I must admit that. I've calculated his credits for salary not taken and offset that against the loans. I still get the balance of loans due the corporation from Dr. Karron of several thousand dollars. Without taking into account in any way the rent he received of $60,000.

MR. RUBINSTEIN: In all due respect, Judge, I don't see how that is possible. Nobody has shown me to this point.

The government hasn't proffered how they come to their figure. I frankly don't comprehend it, but I think that even --

THE COURT: I think you've got to read salaries, Dr. Karron's salaries, as salaries plus loans.

MR. RUBINSTEIN: I do, your Honor.

THE COURT: The loan entries.

MR. RUBINSTEIN: I do. I see an entry for $75,000 as a loan and I don't see any salary -- I don't see the balance of the two entries that I submitted to your Honor --

THE COURT: If he had taken the salary, you'd have a worse situation because you then have the payments due the government for withholding that weren't made, social security weren't made, the other payments of taxes not made as a result of taking less salary. The situation would be less if he had taken all his salary. He would have a worse situation confronting him.

MR. RUBINSTEIN: Do I understand that the Court is not giving him credit for the $70,000 that he contributed in July and August after the grant -- this is money that he took out of a home equity loan, and I submitted the documentation to show that.

THE COURT: I went into that earlier in front of you with counsel and it was stated on the record, without any exception taken, that those monies were for additional expenditures that have been made between June 30 or June 23 and

the date of payment of those amounts.

MR. RUBINSTEIN: But he should get credit for that. These are expenses --

THE COURT: Depends on when the expenditures were made and, as stated in open court and not objected to by you, these were expenditures that occurred after the period of the audit.

MR. RUBINSTEIN: The audit, your Honor -- the audit didn't occur --

THE COURT: The audit didn't occur until later, obviously, but books and records were reviewed as of the date June 23, as I understand it, the date of suspension.

MR. RUBINSTEIN: He was unaware of that. As a matter of fact, Judge, you may recall the testimony that he didn't receive a copy of the audit until September, so he was totally unaware of any discrepancies. He understood that the grant was suspended because --

THE COURT: It doesn't matter whether he was aware of it or not. It's irrelevant.

MR. RUBINSTEIN: I think, Judge, that the concept is, when he's aware, because it's when he becomes aware whether or not his intention in making compensation was motivated by a guilty mind.

THE COURT: All I know -- I am going to take that into account in connection with the 3553(a), but not taking the guideline computation. I'm making the guideline computation as

I've stated, and on that basis. And I'll hear from you further on 3553(a).

MR. RUBINSTEIN: Yes, your Honor. I think that this is a case that is very unusual in that Judge Rakoff used this language in the case that I previously cited, and I have a copy for the government and your Honor, Adelson. Unfortunately --

THE COURT: You'll want your notes, won't you?

MR. RUBINSTEIN: Judge, Judge Rakoff said that there are --

THE COURT: It's a securities fraud case. What part of the case do you want me to refer? I think I see a little error in the opinion, but it's not -- the six or seven points under the base level doesn't depend on the date of the offense. It depends on the maximum penalty for the offense. Here the maximum penalty was ten years, so only six points are allowed. If it were 20 years, it would be seven points. It has nothing to do with the date of the offense. It has something to do with the maximum penalty on the offense.

Give me something else.

MR. RUBINSTEIN: I have the language.

THE COURT: Tell me what you're relying on, because he's probably right.

MR. RUBINSTEIN: I'll try and find it as I'm reading it here, but I have the quote. There may be cases in which the offense level determined under the guidelines substantially

overstates the seriousness of the offense.

THE COURT: You can get that in securities cases because of the number the people who lose as a result of the fraud committed by the officials of the company. The stock is publicly traded and, therefore, you have a number of transactions involved, so you get tremendous losses, as you do in this case, Adelson case. This is a different case.

MR. RUBINSTEIN: He was referring to that, Judge, and you're absolutely right --

THE COURT: I'm fully aware -- I understand that.

MR. RUBINSTEIN: In this case, your Honor, it is a unique case and the government cannot point to one case like it because there is no case like it. And I think that the guidelines overstate the seriousness of what happened here.

There is no question that the United States Government afforded Dr. Karron an opportunity to do research. They had no vested interest financially in the product of his research. Even though he has a business background that dates back over 20 years, he was ill-equipped to handle these funds. And if you could see the way he withdrew money, just the dates when he did it, whether you call it a loan or a salary, you see he functioned as if whenever he needed money he would take it.

So he didn't take a salary until April or May of 2002, eight months into the grant. He takes his first salary check. Before that he's taking loans. At the end of the year he winds

up that he owes all this money that he had taken as a loan back in October 2001, so they take it as salary at that time.

All his efforts and all his energies were devoted to this project, to do the research that the government wanted to be performed for everybody in society's benefit. That's why he got this grant. And when they say credit against loss in 2B1.1(e), they are talking about monies returned, fair market value for the property returned and the services rendered. There is no way to quantify what the value of what Dr. Karron created at that time in this topographical imaging that's used today in all kinds of surgeries and what benefit it was to the nation and to the world.

I think that that takes this case out of the heartland because he, as you know from everything said, he didn't get involved here to benefit himself financially. He took the rent money. He shouldn't have taken it. He owed debts, so he paid the debt with the rent money. That was wrong. That was wrong.

I think that this case goes outside the heartland, that your Honor should consider 3553 Title 18, U.S.C., and consider giving him a nonguideline sentence. And I think that because you sat through a trial with Dr. Karron and you know all the evidence and the background and the way he was advised by people not to do this, not to do that, and he, like a bowl in a China shop, insisted on doing it his way, that is why there is really a legitimate likelihood that if he had followed

protocol and followed procedure that he would not have been sitting here as a defendant in a criminal case.

It seemed that although the budget, which he submitted. Remember, he submitted a budget. He put down 110,000 for equipment. That was what's accepted. He put down for subcontractors, he put down 250,000. He found that he could get students for free. Is he entitled to an offset or consideration for that because he didn't spend the government's money on subcontractors and got free employees to do a job?

There is no suggestion here that the equipment he purchased he used for other items other than this project. The government, by law, owned this equipment. Yes, at the end of the day it was possible for a grant recipient to get possession and benefit from that equipment, but, in reality, he was using government money to buy government equipment which the government took back. They not only took back their equipment, they took back everything, piece of equipment that he had, whether they had any right to it or not, and they kept it.

So that's where he found himself in this case. So I think when you look at the way he managed his money, he saved the government considerable money on subcontractors. He saved them, according to the government's own figures, in the first year $174,000 just on subcontractors. He got the work done, but he didn't have to spend the money because he did something he wasn't supposed to do. He wasn't supposed to have employees

without approval and we had testimony of that.

And in the second year they revised the budget and 110,000 for subcontractors and he used 6100. You know from the testimony here that there were numbers of people working in that apartment on these computers, on this project. And the government wasn't billed for it. Why? Because he was using students. Does the government get a benefit of that? They do.

That is why, your Honor, the mathematical considerations of a strict guideline calculation doesn't apply in this case because Dr. Karron, with good intentions, and good intentions meaning that he wanted the research to work, because that's all he cared about. Those were the good intentions. He might have used improper means, but the intentions were there.

And he created a product which people built upon and I have a manuscript that was submitted to the Elsevier Editorial Systems for computer medical imaging and graphics. This is a draft manuscript that was submitted, hasn't been published yet, but it may well be published in the near future. It cites ATP, it cites Dr. Karron, and it shows that the work that he did may have a significant value. So it's hard to say what the value was, but I don't think anybody in this room could say that he didn't do the research that he was contracted to do.

I think your Honor has to consider the 3553 and ask yourself whether or not his background, this offense, his character, is such that should cause your Honor to impose a

nonguideline sentence.

I think the fact that you're dealing with a man who frankly has a lot of issues. He's not a man anymore. He's, in fact, legally a woman. I spoke to the BOP. Rather, my office did. And he is and as the probation report says, he will be treated as a woman and, if confined, he will go to a women's prison. We submitted letters from people who know him. He has a generous good side to him. He has no criminality in his past, and I think that he will have no criminality in his future.

His mother is incapacitated. She is in a home. They are hopeful. He is now living in that house in Long Beach. Amongst the things he lost here, he lost his home. He is hopeful -- and I spoke to his brother about this. I have a letter from his brother that wasn't included in the original submissions. I am not going to burden the Court with it. He says when his mother needed assistance in the slightest way, the defendant was the one who was there because he was the closest to where his mother was situated in Staten Island, and he's hoping to be able to take his mother home, and he's learning to work a ventilator because she needs that in order to breathe, and that is the hope, that he can stay in the home there.

So I would ask your Honor to consider under, all these circumstances, to fashion a sentence that doesn't have

confinement in a federal institution, that has house arrest, that he could function from the home that he's presently residing in Long Beach; and when his mother gets out, he can assist her there, and provide for restitution out of his future earnings, if he's able to earn anything.

He has been severely compromised in his profession. He has been turned down for positions because this case received a lot of notoriety. They talk about general deterrence. This case has sent a shock wave through the scientific community as to how they ought to comport themselves when dealing with federal grant and federal monies.

There is no question that he will never be eligible -- I don't say never, but, in all probability, will not be eligible to any federal funding so that he could go ahead with his research, which is his life's work, is to do scientific research. And the question is what sentence would be appropriate under all these circumstances, and I don't see that based upon his background and characteristics that confinement is necessary here based on his history and character, and I think that that sort of sentence will be as much as necessary and not more than is necessary as the cases seem to say what punishment should be.

Dr. Karron would like to address you, your Honor, and I know you'll afford him that opportunity.

THE COURT: Does the government want to say something

first?

MR. KWOK: Yes, we do.

Your Honor, we spent a good part of the afternoon arguing about loss amount, and rightly so, because the numbers can be a little bit confusing. But the defendant's conduct, when distilled to its essence, it is very clear what he did. This is not the case about someone forgetting to cross the Ts or dot the I's. This is not the a case about a technical violation. If it were, the government wouldn't have been able to show intent, and the jury wouldn't have been able to return a guilty verdict. And the jury in this case convicted the defendant because the defendant's intent was clearly shown at trial.

The defendant was repeatedly told to stop. The government wasn't in this to trip someone up. The trial testimony established that the people who administered the grant wanted to succeed. That's why they kept telling him and kept working with him to explain the rules to him time and time again ad nauseam. Every one of those times he could have gotten himself out of the hole that he was digging, every one of those times he could have stopped. And none of what he did, none of that money that he would spent would have even been reported to the Department of Commerce, the inspector general's office, much less prosecuted by our office, and, ultimately, the case brought before your Honor.

Of course, the defendant never stopped. He kept misusing the grant money. And not only that, he tried to muck around, as Frank Spring testified, with the company's books to hide his tracks. And Mr. Rubinstein just now talked about him spending less money than he's allotted in the category of subcontracting. And the reason that's so is because he could use students so there was more money left so he could pay himself.

So everything ultimately comes back to how he could use the grant to benefit himself or his company that he owns, CASI, time and time again.

In his e-mails to his friends he didn't mince words about what he was doing. He was, in fact, brazen and open about what he was doing.

THE COURT: I don't think there is any evidence that he used the students so he could pay more money to himself.

MR. KWOK: There is evidence in the record that equipment under $5,000 he would be able to keep at the end of the day.

THE COURT: It may be that it benefited him, but I am not sure from the evidence that he actually intentionally said, I am going to use students rather than subcontract so I could get money for myself. I don't think the record establishes that.

MR. KWOK: Let me go to the larger point. The larger

point is, when no one was looking, when he thought no one was listening, in his e-mail to his friends, he was open about what he was doing. In the e-mail to his friend, he said he wanted to make a lease with his friend living in Connecticut, so he could "make like I only keep a folding bed on 33rd Street. And if ATP buys into this idea, then I can charge my rent on the apartment to the grant and pay my mortgage." He said in another e-mail that if the ATP people didn't agree with him he would turn the grant into enough of a train wreck so the government would be forced to negotiate with him and, quote, find a liveable solution for all.

Now, certainly in that e-mail, after his crime was detected, at no time did he show any remorse. He didn't take any responsibility for his actions. Instead, he tried to engage in, essentially, financial black mail of the government to strongarm the government to accept his fait accompli because he has misspent so much of the government's money. And this kind --

THE COURT: I saw that that was what he might think about doing. I don't think there is any evidence in the record that he strongarmed or attempted to strongarm the government is such.

MR. KWOK: I would submit to the Court that's what it means when he says, I would make the grant enough of a train wreck so that they can find a livable solution for all.

THE COURT: That was one of two alternatives in that e-mail that he mentioned, rather to pay more, I think -- more money to cover the expenses or to make it a train wreck.

MR. KWOK: It's the government's view that those e-mails, when you take them together, it shows the type of brazenness, the type of arrogance that necessarily warrants consideration under the 3553 factors because they go directly to the seriousness of the offense.

Let me turn now to the defendant. Of course, none of this conduct can be considered in a vacuum. It has to be considered in the context of this defendant. And here, too, the 3553 factors argue for a meaningful custodial guidelines sentence.

This is not the case about someone who broke the law because he was in dire straits where some sympathy might appropriately be shown. This is not a food stamps case, this is not a housing fraud Section 8 case where we also calculate the loss under 2B1.1 where sometimes those mitigating circumstances are present.

This is a defendant, who under the grant in year one alone, is given an annual salary of $175,000, $175,000 in taxpayer's money. That's a lot of money for a lot of people, but not for this defendant because he kept misspending the government's grant money to buy equipment that he knows he's not supposed to buy.

Of course, the defendant is a Ph.D. scientist from one of the finest universities in the world. He did not have to steal to put food on the table. He didn't have to steal to find a place to live. But he did it anyway.

I think the defendant's characteristics under 3553 also argue for a custodial sentence within the guidelines.

Finally, your Honor, a guidelines sentence is necessary in this case to serve the goal of the terms. Anyone paying any attention to any public policy debate in the past 10, 20 years knows that one of the prime arguments opponents of these government programs like to use is rampant, it is full of fraud.

We know that's not true in this case because we have ATP witnesses who testified that they keep a close eye on the grant. In fact, they have these rules so that they can closely monitor what the recipients are doing with government money. But there is fraud and this is one such case. And it's the government's view that when a clear-cut fraud case presents itself, there has got to be a strong deterrence, as reflected in a meaningful custodial sentence so that people who get this money will know that you can't just walk away and apologize and say, I shouldn't have done it.

Rather, as his business manager told him himself at the time, you could go to jail for this, and that message should be sent because it is the taxpayer's money, and for

these programs to survive there must be a general deterrence message that if you misspend the government money and you get caught, you don't just get slapped on the wrist and let go.

For all of those reasons, because the defendant's conduct is intentional and repeatedly so, because of the characteristics of this defendant, and because of the need to serve the goals of general deterrence, the government respectfully urges the Court to impose a custodial sentence within the guidelines range.

THE COURT: Dr. Karron, would you like to say something at this time?

THE DEFENDANT: Yes, I would.

MR. RUBINSTEIN: Where should he make the statement from, your Honor?

THE COURT: You can make it sitting there or standing, whichever you wish or she wishes.

THE DEFENDANT: How much time do I have?

Your Honor, I'm deeply sorry for what I have done, more sorry than I can convey with words. I have been doing -- I wish to apologize to the Court and to ATP, to Mark Stanley, who convinced me that I had a chance to win this grant, and to people of the United States, who I feel like I'm working for with this money.

I'm beginning to see that I violated their trust and it disturbs me tremendously for anyone to even think that I

could do that. And if, in fact, I did, then I will take whatever punishment is appropriate. I can only state that I can perhaps explain myself a little bit better and maybe prevent other people from making the same mistakes I've made because I understand, from having lived through it, how the PIs, who receive large grants, think differently than the accountants and the grant managers that are responsible for the money.

And I feel terrible that B.J. and Jane, I got them in trouble. I got myself in a lot more trouble. My past five years have been hell. I thought I knew what I was doing and I recognize now that I really didn't know what I was doing.

I've spoken to other PIs, principal investigators, and I've seen them making the same mistakes, and I've tried to help them. And I know when somebody gives you $2 million, it's like, holy cow, the government of the United States believes in me, they trust me, and they believe in my research. That's an intense thing.

I believed, and I'll admit that I was wrong, that I could use my salary to pay for everything that the grant -- that's indirect on the grant. I didn't know how to keep track of it. I didn't know that I should have taken a paycheck, deposited it into my personal account, and then write a check back to CASI, and CASI should have written a check back to the grant. Then there would be no confusion that I seem to have in

my wake.

Seven years ago I didn't know about accounting. I've always done contracts. I've never done grants. DARPA would give me money. They didn't care what I did with it, as long as I could produce the research that I said I could do. I never understood that a grant, you do whatever you can, but it's how you spend the money that's most important. I didn't know how to spend this money. I didn't think that I was throwing it away. I didn't think I was unduly enriching myself until a couple of years later I realized, I took too much money.

I didn't want to take money unless I absolutely needed it. It was like running a little business. The owner doesn't take the money unless you need it. I didn't want to take salary. I just wanted to take $2,000 at a pop for rent. I thought I could charge it against salary. And at the end of the day, I overdid it.

In the second year I thought I had made amends, but the budget was wedged. I never thought that I would be impaled on my own budget. When I wrote the budget I just needed to fill something in to get the grant out the door by the deadline. I asked a couple of ATP people, what is a reasonable salary? They said, don't worry. In fact, it says, don't worry, so I didn't worry. I was just going to do the research and that was it. I took a big advance so I could eliminate all my personal and financial problems. I didn't want to have to

worry about the money. I wanted to focus on the research. And trying to run this project has destroyed my life. We kept the research going after the project was suspended because the research is mine. The grant doesn't tell me how to live. The grant tells me how to spend the government's money.

But, anyway -- I'm getting lost.

I'm bullheaded. I'm boneheaded. My exwife said I couldn't tell my friends from my enemies. That's really been true in this adventure. I'm a strange person. I let people come and go. I don't know. Just do whatever you want.

I had some brilliant students working on this project who should have been on the payroll. I didn't put them on the payroll. One, because either I was advising them on their Ph.D., or they were already on some other payroll. This whole issue of like, you know, do I take people and pay them more for the same hours? ATP also said, don't do certain things, what I understood I could do. I didn't understand.

I'm boneheaded. I'm also too bright for my own good. When people told me that I could -- when I started thinking that I could use Morse Theory in digital data, in discrete picture data, pixelated data, everybody said you can't do that, it doesn't work. Morse Theory only works for continuum mechanics, not where you have imagery.

But Jim Cox and I talked about it. I think I see a way to do it. Despite everybody telling me, no, no, no, that's

not how you do it; this is how you do it. We persisted, and for ten years we came up with digital Morse Theory and now it's becoming part of the accepted panoply of topological image processing.

If I listened to everybody telling me, no, no, no, you can't do it, you can't do it, fine, I'll do something else. When somebody says, you can't do it, I start blowing steam out my nose. There has got to be a way to do it.

We did get the power approved. I did have long discussions with B.J. and Jane about how we can fix this, how we can change this, what needs to be done. I made regular visits to Washington. I tried to keep in touch with my program managers. They came and visited regularly. We were making good scientific progress. But my attitude was, the hell with the financing, as long as I kept records. I have all of the source records. And give it to the accountant and she will figure it out.

And, you know, I never thought -- we didn't have a year's worth of running actuals to calculate a good budget. And towards the end the accountant was telling me, this is an unliveable budget. You can't do this project with this budget. You need to put a lot more money in. And without coinvestors and cofunding, you're going to get in trouble.

I thought that I could keep overhead minimal, take as little salary as I could, take rent instead of salary, which is

a colossal mistake. It is more of a mistake than even this Court will understand. I have to pay tax twice on the money. This is the stupidest thing imaginable. It's like the absolute worst thing I can do. It inflated my income. The W2s and the 1099s from the grant show that I made $250,000. That's too much. Because I took the same money, gave it back to the company, and paid it again. It was spectacularly dumb.

The worst thing is, worst thing is that my business managers, I really wish that -- we needed to get a new budget. We needed to get a new budget approved. I think we were almost at that point and then I screwed up.

I'm responsible for everything I've done. I took responsibility. I kept records at the time I was doing it. I didn't think I was committing -- I was defrauding the government. I thought as long as I was doing good work, the research is moving ahead, we are presenting at conferences, I'm flying all over the country presenting. We are attracting students, we are attracting attention. That's what was important. In the past five years all -- I have bean counters going over and over and over. I'm still stuck in 2001 and 2003.

My career is over. My colleagues don't return my phone calls. I've alienated my wife and daughter. I've had a sex change operation. I am now going to live as a woman.

I didn't think -- I wanted my staff to be happy and

healthy. I wanted Nicky Winter, the bookkeeper, I wanted her to fix her teeth. I wanted to fix my teeth. I didn't want to have -- I wanted everybody around me to be happy. And I wanted them to know that the fringes were available. I didn't overspend the fringes.

After the grant was suspended I got a job with a colleague and I was much happier working for him than trying to manage my own grant. If I get out from underneath this I would like to advise Mark Stanley in the ATP program, now TIP program, what to look out for in PIs when you give them a lot of money. What are the common misunderstandings that a scientist will have when you give him a lot of money. My colleagues at City College said, we win grants, but we have almost no sale. I wanted to make my little company unique. I wanted to do things different. I wanted to do things nicer, better. I didn't know what to do and I didn't know what I was doing, and I ended up with a train wreck.

Lee Gurfein, my business manager, wanted to lock me up in a room and just give me a computer and let me out for air and exercise. He didn't make any coinvestment. My brother didn't have any signing authority until we had a contract with him and he gave me some money. I did everything he wanted. I did everything my accountant wanted me to do.

I did everything that Bob Benedict wanted me to do. If he told me not to do something, I wouldn't do it. When he

told me to stop paying the rent, it was getting to be a real problem, I stopped. I had to understand why. I didn't get it right. I made a mistake. I never thought it would be this big of a mistake. If I have to go to prison for it, then I'll go to prison for it. I made a mistake. I didn't think -- I hope -- I feel terrible that people feel I violated their trust, and I'll never be able to recover that.

I want to finish the Joe Morse Theory. It has nothing to do with money anymore. It's something that needs to be done. It's why ATP gave me the money. The research was more important than the money, but I didn't know how to handle the money. I think if I got a job as a grants manager, because I needed a job, having made every mistake twice, I would know how to prevent it. I have been advising other colleagues, that kind of attitude is going to get you in real big trouble. I have told them that, and they usually get really mad at me.

Other ATP grants, when I talk with them, I said, be really careful, don't have a certain mind-set. You are not your grant. The grant funds certain activities, but don't put your ego, and get more than one grant and have more than one sponsor.

I thought I could do everything myself. I do everything so hard and so intensely and so monomaniacally, so bipolar that I usually get myself in trouble. This is the worst trouble I've ever got myself in. I don't know. Maybe

I've learned something from it. I tell people I made every mistake twice. It's like if anybody knows the lessons of managing federal and public money, so that everybody can look at it and say, yeah, there is no problem with that, I think I know how to do it.

I could probably pass the CPA exam now. Do I feel comfortable defending what I did, knowing what I did in 2001 with what I know now in 2008? Absolutely not. I made a mess. It was a big mess. But it was fixable. And I wasn't able to fix it. It was too much of a mess, and I just wanted to focus on the research, and I decided to do good work and maybe something good would come out of it.

If I need to go to jail, I'll go to jail. I would like to finish what I started. I would like to help the ATP program in the sense that I can probably smell fraud brewing in the mind-sets of the PIs. Because I have a sense now of what this entails, particularly in small startups, very small startups. That's what ATP wanted to fund, and they should continue to do it, but they need special supervision. When I was doing SBIR grants, they have special supervision for SBIR grants because the PIs don't always know what they are doing.

I don't have a home to go to. My mom is going to die soon. I want to bring her home to die.

Am I wandering off too far?

THE COURT: I couldn't hear you.

THE DEFENDANT: Am I wandering off too far or am I becoming incomprehensible?

My mom is going to die soon. She is on a ventilator. She is on a feeding tube. I'm only trying to bring her home, with my family's consent, so that she is at least home, because that's where she always wanted to be. After she passes on, we are going to have to sell the house anyway because of the bills from the nursing home. If I have to go to prison, I would like to at least see her through.

I'm taking classes now on ventilator care, so at least -- we have three shifts of nurses at the house running a ventilator. I need to be able to cover them. My Ph.D. is sufficiently medical, and I have enough insight on how to run a ventilator that I need a lot of training so I don't screw up, because I think I know what I'm doing, and Mondays are usually my days to go get training.

I pre-separated from paying myself rent because I thought I wanted to take rent as I needed it and not use salary, and just use my salary line to pay utilities and telephone and the legal cost, the bills to Pennie & Edmonds. I tried to keep a green check and a burgundy check. Green checks were nonprogram, burgundy was program.

But we didn't set up the account before we got the first payment from ATP. I took too much money at the beginning, and I tried to put it back. The way I tried to put

it back. Now I just did it all wrong. I thought it didn't matter where I spent the money out of. I just give ATP a stack of receipts.

I tried to keep good records. I got consumed with recordkeeping. It's like I was telling -- it's like I got buried in receipts that I lost and I never added them up. I just took pictures of them and filed them under each day and let the accountant deal with it. She got lost.

I think the best thing I can do for my country is prevent me from happening again. I don't know that I will ever personally handle big federal projects, but I think I can be of value to the program, particularly since they are going to be gun shy to giving money to small grant recipients. And I feel terrible because Mark really believed in me, the program director.

If there is something that can be done with me to help the program, I would do it any way I can. I'm happy to lecture and explain how to get yourself in trouble with more money than you can deal with. I don't know whether that would help. I didn't believe that I really misspent money until I finally had to really, really study exactly what I did, like a third person did it, and I admit I took too much money.

But I didn't not do research. I didn't advance the state of the art. The big problem is that I spent so much time being an amateur accountant that I couldn't be a professional

scientist.

If you can find it in your heart to -- I'm sorry. I'd like this to be over and I would like to move on. If I can help, I will. If making me an example by spending a few years will prison to help, that's what I need to do. If making me an example and I can prevent other people from getting the boneheaded mind-set that I have, maybe my experience is more valuable in some other setting.

I would like to finish the research. And the program would actually -- they are horrified of what's happened, but I think there is a reason why they never completely shut down the grant. They just want me to clean up my act. If we could finish the program with somebody else running it, that's fine, too. My boss at ATP could administer it for me.

Having worked in a big federal defense contractor, I see how they do it. If I had spent a couple of years working in a large corporation, perhaps I would see how these are done. I have never done that. I now know more about grants management than I care to.

I don't know what else to say. I'm really sorry. I didn't try to hide it from anybody. And people call up and say, what's going on? I say, I have been convicted of stealing from the grant. If that's what I did, then I did it, but I never kept it a secret. I took pictures of everything I did. I kept records to hang myself, because I never thought I would

be hanging. I have never thought I would be impaled.

I'm redundant and I'm repetitive and I forget what I say, and I'm a disaster. I really am. I will be late for my own funeral. If I do something too fast, I always forget something, screw something up.

I apologize to the Court for keeping you this late and for everything else that I've done in the past.

Thank you, your Honor.

THE COURT: Thank you.

As I said, under the guidelines, the Court's findings are that the base offense level for this violation for Title 18 Section 666 is found under 2B1.1. The base offense level under subsection (a)(2) of that guidelines is 6. Because more than $120,000 was lost through inappropriate expenses, 10 points are added. Making that decision the Court looked to guideline note which applies to 2F. The guideline note that applies to grants is federal grant under guideline commentary (f)(2)(ii). At that guideline of 16, the guidelines calls for a sentence of 21 to 27 months in prison.

Turning to 18 3553(a) of Title 18, the Court, as the Court must, consider any guidelines sentence as a result of the Booker decision, the Court must take into account the history and circumstances of the offense, history and characteristics of the defendant. The defendant here has no prior record.

And addressing the Court he said that he's never

before had the responsibility before of handling a federal grant and dealt with contracts in the past. Those are contracts, I gather, to perform specific services for a fee, which is a little different than a federal grant. Both of those circumstances relate to the circumstances of the offense and the history and characteristics of the defendant.

But the Court must also impose a sentence which is sufficient but not greater than necessary to comply with the purposes set forth in subparagraph 2 of 3553(a), and that is the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide a just punishment for the offense; B, to afford adequate deterrence to criminal conduct of other persons, and to protect the public from further crimes of the defendant -- C, to protect the public from further crimes of the defendant; and, D, to provide the defendant with needed educational and vocational training, medical care, or other correctional treatment in the most effective manner.

I don't believe that it would be necessary to protect the public from further crimes of the defendant that would serve to ameliorate the penalty imposed under the guidelines.

I have some difficulty with this case because delineating the intent of the defendant is difficult for me. It is true that the loss is at least $120,000, but the defendant's intent in causing that loss is something that the

Court has been concerned about.

And, on the other hand, the Court has to consider a sentence that affords adequate deterrence to criminal conduct and the government gives these grants, they are placing a lot of trust in the grantee. It's important that the grantee not intentionally misapply the funds.

It's clear to me that there was an intentional misapplication of the rent money. The defendant was told time and time again not to use the rent funds for rent or for utilities. That's what the record here substantiates. That's a lesser sum than the sum found in the guidelines.

Under the circumstances, it seems to me as the first offense that the Court should not impose a sentence that is heavy as the guideline and, yet, impose a sentence that provides deterrence to other people. I am going to vary the sentence pursuant to Section 3553(a).

I am going to impose a sentence of 15 months under zone C of the guidelines, one half of the term to be served in prison and one half of home confinement, eight months' imprisonment, and the remainder in home confinement.

The term of supervised release is three years, restitution in the amount of $120,000. That's required, I guess. And a special assessment of $100. I think I'm right on the split sentence, that if it falls in the 12 category, I can give the split sentence.

MR. KWOK: Section 5C1.1, section D.

MR. EVERDELL: Yes, your Honor, I believe it is correct. It has to be a one-for-one ratio.

THE COURT: One has to be imprisonment, the other has to be home confinement.

MR. EVERDELL: That's correct.

THE COURT: That's to enable defendant to take care of his mother as soon as possible.

Three years of supervised release. There will also be a $100 assessment as provided by the law. The conditions of supervised release are: The defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall not possess a firearm or destructive device. Mandatory drug testing is suspended due to the Court's determination that defendant poses little risk of future substance abuse. The defendant shall cooperate in the collection of DNA as directed by the probation officer.

Standard conditions of supervision 1 through 13 will also apply with the following special conditions: Defendant shall provide the probation officer with access to any requested financial information; defendant shall not incur new credit charges or open additional lines of credit without approval of the probation officer unless the defendant is in compliance with the installment schedule, installment payment schedule.

Defendant is to report to the nearest probation office within 72 hours of release from custody and be supervised in the district of his residence. $100 will be due immediately. That's the special assessment. The restitution shall be in the amount of $120,000, payable to the clerk of the United States District Court for disbursement to Julie Weiblinger, U.S. Department of Commerce, National Institute of Standards and Technology, Advanced Technology Program Receivables Group, 100 Bureau Drive, Mail Stop 1624, Gaithersburg, Maryland 20899-1624.

The restitution shall be paid in monthly installments of 10 percent of gross monthly income over the period of supervision to commence 30 days after the date of release from custody, and the defendant shall notify the U.S. Attorney's Office for this district within 30 days of any change of name or residence address that occurs while any portion of the restitution remains unpaid.

If the defendant is engaged in BOP non-UNICOR program, the defendant shall pay $25 per quarter towards the restitution. However, if the defendant participates in the BOP's UNICOR program as a grade 1 through 4, the defendant shall pay 50 percent of her UNICOR earnings to any financial penalties, consistent with Bureau of Prisons regulations of 28 CFI Section 45.11. The factors in 18 United States Code Section 3664(f)(2) were considered in formulating the payment

schedule.

There will be no fine in this case in view of the restitution requirements.

I gather you want to have a voluntary surrender, Mr. Rubinstein?

MR. RUBINSTEIN: Yes, your Honor. I was wondering, if it's possible, I don't know how it works. Is it possible to do the home confinement first and then the incarceration afterwards? So this way if they can get his mother home, because her life expectancy isn't that long.

THE COURT: It seems to me that it could. I don't see anything under the section that says it couldn't. It certainly surprises me.

MR. EVERDELL: I'm sorry to interrupt, your Honor. I do have a different case with Judge Kaplan where he did allow that very thing to happen. If that precedent counts for anything, I believe there is a precedent in the Southern District for doing this.

THE COURT: I am going to do it that way. So the home confinement period will start. You better see that the defendant sees the probation officer in the next 24 hours, Mr. Rubinstein.

MR. RUBINSTEIN: Absolutely. I will go there tomorrow.

THE COURT: We will make arrangements for home

confinement to start. If you have home confinement, there will have to be a telephone without call forwarding in the residence in which the defendant would be located because they have to know that he's not leaving the premises during the period of home confinement. Home confinement is not to interfere with religious services or employment, but it will require the defendant to be home in the evening and nonworking hours part of the day.

MR. RUBINSTEIN: And medical, your Honor?

THE COURT: What?

MR. RUBINSTEIN: And medical.

THE COURT: Of course, he can attend medical appointments for himself and his mother.

There will be no call forwarding or call waiting or modem attached to the telephones. It's clear that he is serving his term of home confinement without any further investigation by the probation office.

MR. RUBINSTEIN: Your Honor, would your Honor consider -- first, on the restitution, did your Honor say how that's to be paid?

THE COURT: Yes, I did. 10 percent of gross pay.

MR. RUBINSTEIN: Is that without interest?

THE COURT: I leave that to the greater, higher authorities. I believe that interest does run.

MR. RUBINSTEIN: Would your Honor --

THE COURT: I believe interest runs. But it can start after the period of incarceration.

MR. RUBINSTEIN: Your Honor, I believe that the defendant wishes to appeal this matter. That's what I've been informed. In view of that, I wonder if your Honor will consider releasing him pending the appeal. He is going to be on house arrest for seven and a half -- I'll reserve the right to make that application.

THE COURT: He can appeal, but I don't see where you can appeal, but is that beneficial to your situation for me to suspend the imposition of sentence pending the appeal?

MR. RUBINSTEIN: I would like to serve the house arrest portion while his mother is alive.

THE COURT: I can't break it up, I don't believe, under the statute.

MR. RUBINSTEIN: I'll have to consider it, Judge. We will go to probation tomorrow. As far as the house arrest, we don't have a problem with starting that immediately.

THE COURT: Make an expedited appeal.

MR. RUBINSTEIN: File an expedited appeal?

THE COURT: All right.

MR. RUBINSTEIN: Thank you very much, your Honor. Good night.

MR. KWOK: A few things, your Honor.

If the government could request the Court to give an

oral pronouncement of his forfeiture order. There is a forfeiture allegation in the indictment.

THE COURT: Is forfeiture required here? I didn't see that in the presentence report.

MR. KWOK: It is not reflected in the presentence report, but, as your Honor might recall, there was an order by stipulation between the parties where we seized the proceeds from the sale of defendant's apartment. And so if we could forfeit that in partial satisfaction of the restitution obligation.

THE COURT: You can submit a forfeiture order, yes.

MR. RUBINSTEIN: The marshals are holding those funds, if that's what the government is talking about.

THE COURT: I have to make an order with respect to it. The marshals already have it.

MR. KWOK: But the order the Court signed says that the money will be held with the U.S. Marshals pending further order of the Court. We will certainly submit an order to release those funds.

THE COURT: So ordered.

MR. KWOK: Thank you.

Also, just one last matter. Because this is a second superseding indictment, the government moves that the underlying indictments be dismissed.

THE COURT: That's granted. I am sure there is no

opposition to that.

MR. RUBINSTEIN: No opposition, your Honor.

THE COURT: You have ten days to file a notice of appeal, Dr. Karron. All you have to do is write a letter to the Court, United States District Court, 500 Pearl Street, New York, New York, and say, I wish to appeal and that will preserve your appeal, but you have to do it within the ten-day period because, otherwise, the Second Circuit will say you waived your right to appeal by not filing that letter within the ten-day period.

You understand me? You're nodding yes.

If you want to appeal, you just write the letter within ten days and that preserves your right. If you don't write it in the ten-day period, you lose your right to appeal. If you don't have funds for an appeal, the Court of Appeals will decide on it for you to handle your appeal free of charge.

MR. RUBINSTEIN: What they do, Judge, in reality, is, they assign trial counsel free of charge. I had that experience with Judge Kaplan, who was mentioned once today already.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA

v. 07 CR 541(RPP)

DANIEL B. KARRON,

Defendant.

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New York, N.Y.
October 27, 2008

Before:

HON. ROBERT P. PATTERSON

District Judge

APPEARANCES

MICHAEL J. GARCIA
United States Attorney for the
Southern District of New York
BY: CHRIS EVERDELL
CHI T. STEVE KWOK
Assistant United States Attorneys

RUBINSTEIN & COROZZO, LLP
Attorneys for Defendant
BY: RONALD RUBINSTEIN

(Case called)

THE COURT: Under Rule 35 I sent out a memo to counsel on Friday because I got word from the Department of Probation that the Department of Probation would not honor the sentence that I imposed in this case and would imprison Dr. Karron for 15 months and that you could not have a sentence that imposed home confinement first. I had imposed home confinement first so that Dr. Karron could take care of his mother during that period, but the Bureau of Prisons won't observe it.

I am in a difficult position.

I would be glad to give you the memo from the Bureau of Prisons from the probation department if you want to look at it.

MR. RUBINSTEIN: Your Honor, that was going to be my request, what is contained on page 2. In order to address the Court's intention that Dr. Karron be allowed to care for his elderly mother, to recommend that you set a voluntary surrender date in the future and entertain requests according to the situation.

THE COURT: We did extend the voluntary surrender date, did we not?

MR. RUBINSTEIN: No, we did not have any provision for voluntary. What I would respectfully request for your Honor is that we put it down for the first week in January and then see what the situation is with his mother and then your Honor could

make the determination about the voluntary surrender at that time. I think that would be in accordance with the intent of the Court that he be --

THE COURT: You can file a notice of appeal for one thing. Let's not overlook that. But I don't see how, having imposed a sentence, I can change it. I don't know that I have any power to do what you are suggesting, for one thing.

MR. RUBINSTEIN: You always have the power, your Honor, as far as when the defendant can surrender.

THE COURT: That part, if I re-impose sentence, but putting off sentence as you suggest -- or maybe I misunderstood you -- judgment has been entered in this case. And when they got the judgment, they replied to this memorandum saying that the Bureau of Prisons wouldn't honor the judgment because of their regulations.

MR. RUBINSTEIN: Maybe I misspoke. I am in agreement with the recommendation of the probation department. The Court can set a voluntary surrender date in the future. And then at that time you can entertain a request for an adjournment of that surrender date.

THE COURT: I am perfectly willing to set a voluntary surrender date in the future, but at this time it would be now because I have to act within one week.

MR. RUBINSTEIN: I would ask your Honor, if your Honor would entertain a voluntary surrender date at this time for the

first week in January.

THE COURT: I have no problem with that.

Does the government have any problem with that?

MR. KWOK: If I understand Mr. Rubinstein correctly, he is suggesting the setting of a voluntary surrender date today with extensions from time to time.

THE COURT: As I understand it, he is saying I agree that the sentence has to be modified as recommended by the probation department, but I want to have his surrender date stayed until the first week in January.

MR. KWOK: The government's position is that a surrender date should be set a few weeks from now. As Mr. Rubinstein is aware, essentially putting it off until later and with indefinite extensions, depending on the circumstances --

THE COURT: I am not going to do indefinite extensions. If you file a notice of appeal, that is another matter. Then you can ask for bond pending appeal. I cannot go putting it off and off and off.

MR. KWOK: That is the government's concern because of the uncertainty of the mother's health situation. We are concerned that this would amount to, essentially, bail pending appeal without making an application for bail pending appeal, and we all know that the standard is extremely high.

The government would ask that a surrender date be set

no later than a few weeks from now. And then if Mr. Rubinstein wants to file a notice of appeal, he can ask the Circuit Court for relief if he wants appeal or to have bail pending appeal.

MR. RUBINSTEIN: Your Honor, I don't think that meets with what your Honor's initial intention was, and I think what the probation department says spells it out exactly to accomplish --

THE COURT: Give me back my memorandum.

MR. RUBINSTEIN: Page 2.

THE COURT: I have some other people waiting here and I cannot deliberate on this forever here.

I see what you are pointing to, but I cannot keep putting it off forever on that type of application, bail pending appeal. I don't think that Dr. Karron is likely to flee, but I am not going to do that, Mr. Rubinstein, the way that you are suggesting. I will put it off for over the holidays so that he can surrender after January 10th or if you get bail pending appeal until January 10th.

MR. RUBINSTEIN: Would you entertain it now?

THE COURT: I would rather have it sometime later because I have these people waiting.

MR. RUBINSTEIN: We will put it down for January 10th, did your Honor say?

THE COURT: That will get us past the Christmas holidays, and I will impose a split sentence of seven and a

half months of imprisonment at the Bureau of Prisons to be followed by seven and a half months of home confinement and supervised release so that he can take care of his mother. And that term of supervised release would be three years, the first seven and a half months being home confinement.

It will be the same conditions of supervised release that I imposed on October --

MR. RUBINSTEIN: -- 20th, your Honor.

THE COURT: 20th, and the same standard conditions that I imposed on that date will also remain as part of this judgment.

The special assessment of $100 will also apply, as well as the restitution order of October 20 and the amount of payments to be made pursuant to the restitution order. In other words, the monthly payment, 10 percent of gross monthly income, and the period of supervision to commence 30 days after release from home confinement.

And the defendant shall notify the United States Attorney of any change of address during the period of supervision.

Special instructions with regard to the payment of the monetary penalties will apply.

Is there anything further?

MR. RUBINSTEIN: I take it that the sentence technically and legally is imposed as of today, so the 10 days

for filing a notice would start today and not --

THE COURT: I guess it would be from the date of this judgment or this sentence and that you have 10 days to challenge the terms of the sentence.

MR. KWOK: Do I understand the January 10 date to be the surrender and should defense counsel wish to make bail pending appeal --

THE COURT: He would have to make it before January 10th so that he can get a decision from the court on the bail pending appeal.

MR. RUBINSTEIN: Thank you very much, your Honor.

MR. KWOK: Thank you, your Honor.

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[3110-01]

KA-3335

OFFICE OF MANAGEMENT AND BUDGET

KA-3335

IMPLEMENTATION OF FEDERAL GRANT AND COOPERATIVE AGREEMENT ACT OF 1977 (PUB. L. 95-224)

Final OMB Guidance

AGENCY: Office of Management and Budget.

ACTION: Notice of final OMB guidance for Federal agency use in implementing the Federal Grant and Cooperative Agreement Act of 1977.

SUMMARY: The Federal Grant and Cooperative Agreement Act distinguishes between procurement and assistance relationships and mandates that Federal agencies use contracts for procurement transactions:

SEC. 4. Each executive agency shall use a type of procurement contract as the legal instrument reflecting a relationship between the Federal Government and a State or local government or other recipient (1) whenever the principal purpose of the instrument is the acquisition, by purchase, lease, or barter, of property or services for the direct benefit or use of the Federal Government; or (2) whenever an executive agency determines in a specific instance that the use of a type of procurement contract is appropriate.

and grants or cooperative agreements for assistance transactions:

SEC. 5. Each executive agency shall use a type of grant agreement as the legal instrument reflecting a relationship between the Federal Government and a State or local government or other recipient whenever (1) the principal purpose of the relationship is the transfer of money, property, services, or anything of value to the State or local government or other recipient in order to accomplish a public purpose of support or stimulation authorized by Federal statute, rather than acquisition, by purchase, lease, or barter, of property or services for the direct benefit or use of the Federal Government; and (2) no substantial involvement is anticipated between the executive agency, acting for the Federal Government, and the State or local government or other recipient during the performance of the contemplated activity.

SEC. 6. Each executive agency shall use a type of cooperative agreement as the legal instrument reflecting a relationship between the Federal Government and a State or local government or other recipient whenever (1) the principal purpose of the relationship is the transfer of money, property, services, or anything of value to the State and local government or other recipient to accomplish a public purpose of support or stimulation authorized by Federal statute, rather than acquisition, by purchase, lease, or barter, of property or services for the direct benefit or use of the Federal Government; and (2) substantial involvement is anticipated between the executive agency, acting for the Federal Government, and the State or local government or other recipient during performance of the contemplated activity.

Federal agencies must implement sections 4, 5, and 6 by February 3, 1979. OMB's interim guidance is to promote consistent implementation of the Act.

Section 8 of the Act requires OMB to conduct a study of Federal assistance relationships and provide a report to Congress no later than February 1980. This will focus on developing a better understanding or alternative means for implementing Federal assistance programs and on determining the feasibility of developing a comprehensive system of guidance for Federal assistance programs. In undertaking the study, OMB is required by the act to consult and, to the extent practicable, involve representatives of the executive agencies, Congress, General Accounting Office, State and local governments, other recipients, and interested members of the public. A draft plan outlining the proposed scope of the study was published in the FEDERAL REGISTER on June 23, 1978, for comment. Comments on the draft plan are due to OMB by August 23, 1978.

FOR FURTHER INFORMATION CONTACT:

Thomas L. Hadd, Intergovernmental Affairs Division, Office of Management and Budget, Room 9026, NEOB, Washington, D.C. 20503, telephone 202-395-5156.

DAVID R. LEUTHOLD,
Budget and Management Officer.

SUMMARY OF MAJOR COMMENTS ON THE DRAFT GUIDANCE AND THE OMB RESPONSE

The Act authorizes the Director of OMB to issue supplementary interpretative guidelines to promote consistent and efficient use of contracts, grants, and cooperative agreements. On May 19, 1978, OMB published a proposed draft of the guidance in the FEDERAL REGISTER for comment.

Numerous comments were received from Federal agencies and others. The majority of the comments suggested ways for improving the clarity of the draft and many of these improvements are reflected in the final guidance. Some comments dealt with aspects or potential effects of the Act itself that are beyond the scope of this guidance. There were also comments or suggestions that could not be used in revising the guidance, but which will be considered during the study.

A summary of the more important substantive comments about specific parts of the draft proposal along with the OMB response to them follow:

A. OMB interpretation of the Act.

1. General purposes of the Act.

Comment. One agency pointed out that there are a number of types of transactions that are not covered by the Act, such as the sale, lease, license, and other authorizations to use Federal property, when not for the purpose of support or stimulation.

Response. The guidance was amended to reflect this fact.

A. 3. Interpretation of specific provisions of the Act.

Comment. There were several comments about the clarity of the guidance in interpreting subsection 4(2) of the Act, which allows the use of contracts "whenever an executive agency determines in a specific instance that the use of a type of procurement contract is appropriate." Most of the comments related to the possible use of "assistance contracts."

Response. The guidance was revised by including a direct quote from the legislative history, and by stating that in all transactions based on this subsection of the Act, procurement contracts must be used.

Comment. One comment was received expressing the opinion that subsection 7(a) of the Act, which authorizes agencies to use procurement contracts, grants, and cooperative agreements as provided for in the Act unless otherwise prohibited, should be interpreted as replacing the Grants Act. The Grants Act provided general authority to use grants for funding research.

Response. OMB cannot agree with this interpretation, since Pub. L. 95-224 specifically repeals the Grants Act and requires that the selection of the appropriate legal instrument be based on the character of the specific transaction (i.e., procurement or assistance) rather than on a functional activity or class of recipient.

B. Distinguishing between procurement and assistance.

1. Basic determinations.

Comment. Although a major purpose of the Act is to distinguish between procurement and assistance, several observers indicated they did not feel the OMB draft guidance was in sufficient detail. One comment was made that the guidance should stress the principal purpose of a transaction as being the most important determinant. Two comments requested that agencies be guided to use grants for research funding.

Response. In most cases, agencies will have no trouble distinguishing between procurement and assistance. Where the distinction is hard to make, OMB believes that the agency mission and intent must be the guide, and that more detailed criteria would not be useful. The suggestion that emphasis be placed on the principal purpose was followed. The request to guide the agencies to use grants to fund research is not consistent with the Act. OMB will continue to work with the agen-

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cies to promote consistency in agency determinations on procurement and assistance distinctions.

B. Assistance awards to for-profit organizations.

Comment. Some of the comments indicated confusion over whether the Act authorizes assistance awards to for-profit organizations.

Response. A subsection was added that indicates assistance awards may be made to for-profit organizations if the awards are consistent with sections 4, 5, and 6 of the Act.

C. Characterization of grants and cooperative agreements.

Comment. Many comments were received on this section. Most of them indicated a need for clarifying the guidance or suggested ways of doing it.

Response. The entire section has been rewritten for clarification. One additional provision was added to indicate that transactions that include very precise Federal requirements and provisions for intense monitoring of these requirements may properly be classified as cooperative agreements.

C. 2. OMB policy on substantial involvement.

Comment. There were several expressions of concern that cooperative agreements, as a new class of assistance instruments, might lead to greater Federal involvement, particularly in research projects.

Response. The guidance has been revised to state that nothing in this Act can be interpreted as a basis for increasing Federal involvement beyond that authorized by program statutes.

D. Agency decision structure for selection of instruments.

Comments. It was pointed out that the guidance, as drafted, would not apply to the organization and processes of some agencies.

Responses. The guidance was rewritten to convey the original intent but to be less restrictive on how agencies should follow it.

E. Administrative requirements for grants and cooperative agreements.

Comment. There were a number of comments about whether or not these requirements should apply to cooperative agreements. It was also pointed out that some of these requirements do not now apply to some classes of recipients, such as for-profit organizations.

Response. The legislative history specifically indicates that OMB Circular A-102 is part of the existing system of guidance, and the creation of the cooperative agreement instrument should not lead to a bypass of this initial step. The point about the limited applicability of some of the administrative requirements has been included in the final guidance. OMB will consider the question of administrative requirements as they relate to grants and cooperative agreements during the study required by section 8 of the Act.

F. Specific guidance for grants.

1. Distinction between grants and subsidies.

Comments. Several comments were received that the draft guidance on this point was inadequate.

Response. The distinction between grants, which are covered under section 5 of the Act, and subsidies, which are not, will have to be included in the section 8 study. Accurate coverage is not possible at this time, so this paragraph has been removed from the guidance.

L. Agency records and M. OMB reporting requirements.

Comment. There were numerous comments that both of these sections impose a considerable burden on the agencies.

Response. One purpose of the Act is to provide Congress with more information on the operations of Federal assistance programs. OMB is trying to keep the burden to a minimum, consistent with this purpose. These sections are to give the agencies an early indication of the type of information that will be needed.

GUIDANCE TO THE FEDERAL AGENCIES

The transmittal memorandum from the Director of OMB to the heads of Federal agencies and the attached guidance follow.

EXECUTIVE OFFICE OF THE PRESIDENT,
OFFICE OF MANAGEMENT AND BUDGET,
Washington D.C. August 15, 1978.

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

From: James T. McIntyre, Jr.

Subject: OMB Guidance for Implementing the Federal Grant and Cooperative Agreement Act.

The Federal Grant and Cooperative Agreement Act of 1977 (Pub. L. 95-224) requires that by February 3, 1979, Federal agencies use procurement contracts to acquire property or services for the direct benefit or use of the Federal Government and grants or cooperative agreements to transfer money, property, services, or anything of value to recipients to accomplish a Federal purpose of stimulation or support authorized by statute.

The act authorizes the Office of Management and Budget to issue supplementary interpretative guidelines to promote consistent and efficient use of contracts, grants, and cooperative agreements as defined in the act. It is hoped that the attached OMB guidance will not only promote consistent and orderly implementation of the act, but also aid in minimizing potential disruptions resulting from possible revisions to procedures and application materials.

A draft of this guidance was published in the May 19, 1978, FEDERAL REGISTER for agency and public comment. While we received a number of suggestions for improving and clarifying specific sections, relatively few basic policy issues that could be treated in the guidance were brought to our attention. The attached guidance reflects, to the extent practicable, comments provided in response to the public notice. Agency representatives assisted in revising the draft and bringing it to its final form. This guidance will appear as a Notice in the FEDERAL REGISTER in the near future.

OMB is authorized to except individual transactions or programs from provisions of the act until February 3, 1981. Exception policy and procedures are included in the guidance. In the meantime, OMB is required to conduct a study to develop a better understanding of alternative means for implementing Federal assistance programs and to determine the feasibility of developing a comprehensive system of guidance for Federal Assistance programs. Many of the issues addressed in the OMB guidance will also be the subject of further review in the study. A draft plan for the study was published in the June 23, 1978, FEDERAL REGISTER for a 60-day public comment period. A report on the study is to be submitted to Congress no later than February 1980.

OMB GUIDANCE TO AGENCIES FOR IMPLEMENTING THE FEDERAL GRANT AND COOPERATIVE AGREEMENT ACT

(Pub. L. 95-224)

Introduction. The Federal Grant and Cooperative Agreement Act of 1977 (Pub. L. 95-224), signed February 3, 1978, requires executive agencies to distinguish procurement relationships from assistance relationships. A major objective of the act is to achieve consistency in the use of legal instruments by agencies for procurement and assistance transactions. This is a preliminary step toward a broad review of the administration of Federal assistance programs and the relationships created by the terms and conditions of legal assistance instruments. Section 4 of the act requires the use of procurement contracts for all agency acquisition activity. Sections 5 and 6 require the use of grants or cooperative agreements for specified types of assistance relationships. Section 9 authorizes the Director of the Office of Management and Budget to issue supplementary interpretative guidelines to promote consistent and efficient implementation of sections 4, 5, and 6. Subsection 10(d) authorizes the Director to except individual transactions or programs from the act's provisions.

In addition, section 8 of the act requires OMB to conduct a study of Federal assistance relationships and submit a report to Congress in 2 years. The guidelines that follow are based on OMB authorizations under sections 8, 9, and 10(d).

CONTENTS

A. OMB interpretation of the Act.
B. Distinguishing between procurement and assistance.
C. Characterization of grants and cooperative agreements.

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D. Agency decision structure for selection of instruments.
E. Administrative requirements for grants and cooperative agreements.
F. Specific guidelines for grants.
G. Specific guidelines for cooperative agreements.
H. Assistance transactions involving only non-monetary transfers.
I. OMB exception policy.
J. OMB exception procedures.
K. Joint funding under grants and cooperative agreements.
L. Agency records.
M. OMB reporting requirements.

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GUIDANCE

A. OMB INTERPRETATION OF THE ACT

1. *General purposes of the Act.* OMB views the Federal Grant and Cooperative Agreement Act as an important opportunity to review, improve, and simplify the broad array of Federal assistance relationships. It sees the Act's objective of Federal consistency for various types of relationships coinciding with the President's goal of making Federal program actions more understandable and predictable. Agencies should give serious consideration to the policy implications of the Act's provisions, particularly Sections 4, 5, and 6, pertaining to the use of contracts, grants, and cooperative agreements as these involve the essence of the way agencies perform fundamental functions.

This Act does not cover all possible relationships that may exist between Federal agencies and others. For example, the sale, lease, license, and other authorizations to use Federal property, when not for the purpose of support or stimulation, are not within the scope and intent of Pub. L. 95-224 or this guidance.

2. *Orderly implementation of sections 4, 5, and 6.* These sections of the Act require agencies to use contracts for all procurement actions, and grants or cooperative agreements to transfer money, property, services, or anything of value to recipients to accomplish a Federal purpose of stimulation or support authorized by statute. Subsection 10(b) says:

> Nothing in this Act shall be construed to render void or voidable any existing contract, grant, cooperative agreement, or other contract, grant, or cooperative agreement entered into up to one year after the date of enactment of this Act.

The legislative historic clearly indicates that Congress intended this provison to provide one year for orderly implementation of sections 4, 5, and 6. The Act was signed February 3, 1978. Agencies have until February 3, 1979, to implement these sections in accordance with the OMB guidelines.

3. *Interpretation of specific provisions of the Act.* To promote consistency, agencies should interpret subsections 4(2), 7(a), and 7(b) of the Act as follows:

a. Subsection 4(2) allows the use of contracts "whenever an executive agency determines in a specific instance that the use of a type of procurement contract is appropriate." The Senate Report on the Act says:

> "This subsection accommodates situations in which an agency determines the specific public needs can be satisfied best by using the *procurement process.* For example, subsection 4(2) would cover the two-step situation in which a Federal agency may procure medicines which it then "grants" to non-Federal hospitals. This subsection does not allow agencies to ignore sections 5 and 6. Compliance with the requirements of sections 4, 5, and 6 will necessitate deliberate and conscious agency determinations of the choice of instruments to be employed. (Italics added.)

Until the Federal Acquisition Regulation is published, the Federal Procurement Regulation, the Armed Services Procurement Regulation, and other procurement regulations authorized by law govern policy and procedures regarding procurement contracts awarded under the authority of this subsection. Section M of this guidance includes a reporting requirement for procurement transactions based on subsection 4(2).

b. Subsection 7(a) says:

> Notwithstanding any other provision of the law, each executive agency authorized by law to enter into contracts, grant or cooperative agreements, or similar arrangements is authorized and directed to enter into and use types of contracts, grant agreements, or cooperative agreements as required by this Act.

If, prior to the passage of the Act, an agency was authorized to use one or more of the three instruments—procurement contracts, grants, or cooperative agreements—and is not prohibited from using any of them, this provison enables it to enter into any of the three types of arrangements, subject to the criteria set forth in sections 4, 5, and 6.

c. Subsection 7(b) says:

> The authority to make contracts, grants, and cooperative agreements for the conduct of basic or applied research at nonprofit institutions of higher education, or at nonprofit organizations who primary purpose is the conduct of scientific research shall include discretionary authority, when it is deemed by the head of the executive agency to be in furtherance of the objectives of the agency, to vest in such institutions or organizations, without further obligation to the government, or on such other terms and conditions as deemed appropriate, title to equipment or other tangible personal property purchased with such funds.

The Act repeals the Grants Act, Pub. L. 85-934, which authorized the use of grants for scientific research. This provision continues the authority of the Grants Act to vest title to equipment purchased with Federal funds in a nonprofit organization. It expands this authority to other classes of property and applies to procurement contracts and cooperative agreements as well as grants.

B. DISTINGUISHING BETWEEN PROCUREMENT AND ASSISTANCE

1. *Basic determinations.* While one of the major objectives of the Act is to distinguish between procurement and assistance relationships, neither term is specifically defined. Section 4 requires use of a procurement contract when the principal purpose is acquisition, by purchase, lease, or barter, of property or services for the direct benefit or use of the Federal Government. Sections 5 and 6 require the use of grants or cooperative agreements when the pricipal purpose is the transfer of money, property, services, or anything of value to accomplish a public purpose of support or stimulation authorized by Federal statute, rather than acquisition, by purchase, lease, or barter, of property or services for the direct benefit or use by the Federal Government.

Agencies should interpret the language of sections 5 and 6 which call for the use of grants or cooperative agreements to "accomplish a public purpose of support or stimuation authorized by Federal statute" as including but not restricted to traditioinal assistance transactions. Thus, for example, where an agency authorized to support or stimulate research decides to enter into a transaction where the *principal purpose* of the transaction is to stimulate or support research, it is authorized to use either a grant or a cooperative agreement. Conversely, if an agency is not authorized to stimulate or support research, or the *principal purpose* of a transaction funding research is to produce something for the government's own use, a procurement transaction must be used. Until the Federal Acquisition Regulation is published, the Federal Procurement Regulation, the Armed Services Procurement Regulation, and other procuremnt regulations authorized by law govern policy and procedures regarding procurement contracts.

2. *Assistance awards to for-profit organizations.* Subject to the requirements of sections 4, 5, and 6 of the Act, assistqnce awards may be made to for-profit organizations when deemed by the agency to be consistent with legislative intent and program purposes.

3. *When to decide on the use of procurement or assistance instruments.* Any public notice, solicitation, or request for applications or proposals should indicate whether the intended relationship will be one of procuremnt or assistance.

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4. *What to do if the distinctions between procurement and assistance do not apply to a specific class of transactions.* Agencies should make every effort to ensure their relationships conform with those specified in the Act. If, however, there are major individual transactions or programs which contain elements of both procurement and assistance, but which cannot be characterized as having a *principal purpose* of one or the other, an OMB exception should be requested. Sections I and J deal with OMB exceptions.

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C. CHARACTERIZATION OF GRANTS AND COOPERATIVE AGREEMENTS

1. *Anticipated substantial involvement during performance.* The basic statutory criterion for distinguishing between grants and cooperative agreements is that for the latter, "*substantial* involvement is *anticipated* between the executive agency and the recipient *during performance* of the contemplated activity" (emphasis added). To insure consistent determinations, all agencies should use only this criterion when deciding to use either a grant or a cooperative agreement.

a. Anticipated substantial Federal involvement is a relative rather than an absolute concept. The examples that follow in "b" and "c" are not meant to be a checklist or to be considered as individual determinants. Rather, they are to illustrate the general policy that:

(1) When the terms of an assistance instrument indicate the recipient can expect to run the project without agency collaboration, participation, or intervention as long as it is run in accordance with the terms of the assistance instrument, substantial involvement is not anticipated.

(2) When the instrument indicates the recipient can expect agency collaboration or participation in the management of the project, substantial Federal involvement is anticipated.

b. As a guide to making these determinations, anticipated substantial involvement during performance does not include:

(1) Agency approval of recipient plans *prior* to award.

(2) Normal exercise of Federal stewardship responsibilities during the project period such as site visits, performance reporting, financial reporting, and audit to insure that the objectives, terms, and conditions of the award are accomplished.

(3) Unanticipated agency involvement to correct deficiencies in project or financial performance from the terms of the assistance instrument.

(4) General statutory requirements understood in advance of the award such as civil rights, environmental protection, and provision for the handicapped.

(5) Agency review of performance *after* completion.

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(6) General administrative requirements, such as those included in OMB Circulars A-21, A-95, A-102, A-110, and FMC 74-4.

c. Conversely, anticipated involvement during performance would exist and, depending on the circumstances, could be substantial, where the relationship includes, for example:

(1) Agency power to immediately halt an activity if detailed performance specifications (e.g., construction specifications) are not met. These would be provisions that go beyond the suspension remedies of the Federal Government for nonperformance as in OMB Circulars A-102 and A-110.

(2) Agency review and approval of one stage before work can begin on a subsequent stage during the period covered by the assistance instrument.

(3) Agency review and approval of substantive provisions of proposed subgrants or contracts. These would be provisions that go beyond existing policies on Federal review of grantee procurement standards and sole source procurement.

(4) Agency involvement in the selection of key recipient personnel. (This does not include assistance instrument provisions for the participation of a named principal investigator for research projects.)

(5) Agency and recipient collaboration or joint participation.

(6) Agency monitoring to permit specified kinds of direction or redirection of the work because of interrelationships with other projects.

(7) Substantial, direct agency *operational involvement* or *participation* during the assisted activity is anticipated prior to award to insure compliance with such statutory requirements as civil rights, environmental protection, and provision for the handicapped. Such participation would exceed that normally anticipated under (b)(4), above.

(8) Highly prescriptive agency requirements prior to award limiting recipient discretion with respect to scope of services offered, organizational structure, staffing, mode of operation, and other management processes, coupled with close agency monitoring or operational involvement during performance over and above the normal exercise of Federal stewardship responsibilities to ensure compliance with these requirements.

2. *OMB policy on substantial involvement.* Agencies should limit Federal involvement in assisted activities to the minimum consistent with program requirements. Nothing in this Act should be construed as authorizing agencies to increase their involvement beyond that authorized by other statutes.

3. *How technical assistance and guidance relate to substantial involvement.* The practice of some agencies of providing technical assistance, advice, or guidance to recipients of financial assistance does not constitute substantial involvement if:

a. It is provided at the request of the recipient, or;

b. The recipient is not required to follow it, or;

c. The recipient is required to follow it, but it is provided prior to the start of the assisted activity and the recipient understood this prior to the financial assistance award.

4. *What to do if grants or cooperative agreements do not fit program requirements.* There may be a few cases of assistance programs covered by section 5 or 6 of the Act where neither a grant nor a cooperative agreement is suitable. In such cases, an OMB exception should be requested in accordance with sections I and J below.

5. *Competition for assistance awards.* Consistent with the purposes of Pub. L. 95-224, agencies are encouraged to maximize competition among all types of recipients in the award of grants or cooperative agreements, in consonance with program purposes.

D. AGENCY DECISION STRUCTURE FOR SELECTION OF INSTRUMENTS

The determinations of whether a program is principally one of procurement or assistance, and whether substantial Federal involvement in performance will normally occur are basic agency policy decisions. Agency heads should insure that these general decisions for each program are either made or reviewed at a policy level. A determination that a program is principally one of procurement or assistance does not preclude the use of any of the types of instruments when appropriate for a particular transaction. Congress intended the Act to allow agencies flexibility to select the instrument that best suits each transaction. Agencies should insure that all transactions covered by the Act are consistent with their basic policy decisions for each program.

E. ADMINISTRATIVE REQUIREMENTS FOR GRANTS AND COOPERATIVE AGREEMENTS.

Present administrative requirements such as OMB Circulars A-95, A-102, and A-110 apply to both grants and cooperative agreements involving the transfer of Federal funds. Some of these administrative requirements apply to specific classes of recipients such as State and local governments. This guidance does not extend the coverage of these requirements to instruments with other recipient classes such as for-profit organizations. These

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administrative requirements will not apply to General Revenue Sharing or Anti-Recession Fiscal Assistance Grants administered by the Treasury Department.

Each assistance instrument must provide that the head of the assisting agency and the Comptroller General of the United States, or any of their duly authorized representatives, shall have access to any books, documents, papers, and records of the recipient and their subgrantees which are pertinent to the transaction for the purpose of making audits, examination, excerpts, and transcripts.

F. SPECIFIC GUIDELINES FOR GRANTS

1. *Increasing Federal involvement during a grant period.* At times an agency may find it necessary to increase the involvement in a grant-funded project during the period of time covered by the grant. This could happen, for example, when standard grant reports or monitoring indicates some sort of problem. If this occurs, agencies should not view the Act as restricting their authority to intervene as necessary to bring the project into conformance with original intentions. Agencies should not, however, seek to become substantially involved in a long term or ongoing grant-funded activity without converting the grant instrument to a cooperative agreement following negotiation with the recipient.

G. SPECIFIC GUIDELINES FOR COOPERATIVE AGREEMENTS

1. *Alternative uses of cooperative agreements.* In all cases, the determination of when to use cooperative agreements will be based on the need for substantial Federal involvement in the assisted activity.

a. Some programs now using grants will require the use of cooperative agreements exclusively. This determination should be based on statutory requirements or policy level determinations of substantial Federal involvement in the performance of the assisted project.

b. Other programs may use grants or cooperative agreements, depending on the nature of the project or the abilities of the recipients. For example:

(1) Some projects may start out as cooperative agreements in the first year and be converted to grants after recipient capacity has been established.

(2) Other projects, initially funded as grants, may have to be renewed or continued for subsequent budget periods as cooperative agreements if there is a need to revise the project, upgrade recipient capacity, or protect the Federal interest.

2. *Statement of Federal involvement.* Each cooperative agreement should include an explicit statement of the nature, character, and extent of anticipated Federal involvement. These statements must be developed with care to avoid unnecessarily increasing Federal liability under the assistance instrument.

H. ASSISTANCE TRANSACTIONS INVOLVING ONLY NONMONETARY TRANSFERS

1. *Types of assistance included.* Sections 5 and 6 apply to transactions that transfer "property, services, or anything of value," which *could* include consultation, technical services, information, and data. This section of the guidance applies to agencies and programs that provide such types of nonmonetary assistance apart from fund transfers.

2. *Applicability of administrative standards.* Section E above stated that existing administrative standards (e.g., OMB Circulars A-95, A-102, A-110) apply to grants and cooperative agreements involving the transfer of funds.

Agencies are encouraged, however, to use these standards where appropriate, and in some cases, their use is required for nonmonetary transfers. For example, a donation of a substantial parcel of land to a local government is the type of Federal action covered by Part II of A-95, but other administrative standards may not apply.

3. *OMB exception for nonmonetary assistance.* OMB exempts programs and transactions providing nonmonetary assistance from the provisions of section 5 of the Act. Existing agency practices for providing nonmonetary assistance where no Federal involvement in the assisted activity is anticipated should continue. Thus a formal grant instrument is not required to provide surplus property, consultation, or data. Where substantial Federal involvement in the assisted activity is anticipated, however, a cooperative agreement is required as indicated in section 6 of the Act. Agencies engaged in the provision of nonmonetary assistance will be asked to report on these activities under section M below.

I. OMB EXCEPTION POLICY

1. *General.* Section 10(d) authorizes the Director of OMB to:

> Except individual transactions or programs of any executive agency from the application of the provisions of this Act. This authority shall expire one year after receipt by the Congress of the study provided for in section 8 of this Act.

Agencies are advised that, unless otherwise indicated, OMB exceptions will run through January 1981.

2. *Exceptions provided in this guidance.* Section H 3 of this guidance excepts nonmonetary grants.

3. *Other exceptions under the Act.* Agencies are required to conform with sections 4, 5, and 6 of the Act. Where severe disruption to a program or serious consequences to recipients would result, a request for exceptions should be made to OMB. OMB intends to grant additional exceptions only on the basis of agency requests that include strong justifications and an indication of the harm that will result if an exception is not granted. Section J below indicates the procedures agencies should follow in requesting exceptions.

4. *Waiver of administrative standards.* OMB is responsible for most of the administrative standards that apply to assistance programs. Agencies should follow these standards. The circulars that establish these standards presently provide procedures for granting of waivers. If the standards appear unsuitable to a particular situation, requests for waivers should be sent to the OMB office responsible for the circular or the responsible agency if not OMB (e.g., for GSA uniform relocation provisions). Requests for waivers to financial management circulars administered by OMB should be addressed to John Lordan, Chief, Financial Management Branch, OMB, Room 6002, NEOB, Washington, D.C. 20503.

J. OMB EXCEPTION PROCEDURES

A request for an OMB exception under this Act should be addressed to Deputy Associate Director for Intergovernmental Affairs, Room 9025, NEOB, Washington, D.C. 20503. It should include:

1. A statement on whether the exception is requested for a complete program or an individual transaction.

2. An explanation of why an exception is requested, including statutory, agency policy, or other reasons.

3. A statement of what the agency will do if an exception is not granted and what the implications would be if this action were taken.

4. An indication of how the agency will handle the situation if the OMB exception expires before there are any changes to either this Act or agency statutes.

K. JOINT FUNDING UNDER GRANTS AND COOPERATIVE AGREEMENTS

Subsection 10(c) of the Act specifically provides for projects funded under the Joint Funding Simplification Act that include more than one type of assistance relationship. Thus a project with some components funded by grants and others by cooperative agreements is entirely permissible. Agencies should view this Act as providing the opportunity and authority to participate in joint funded projects in any number of funding relationships to serve the best interests of the participating agencies programs.

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L. AGENCY RECORDS

Both Congress and OMB view this Act as a preliminary step toward long-range overhaul of Federal assistance activities. The requirement for agencies to implement sections 4, 5, and 6 in one year is, in large part, to begin the systematic gathering of data about Federal assistance relationships. Agencies should anticipate that congressional committees, the General Accounting Office, and OMB will be asking extensive questions about the effects of implementing these sections. While the questions may vary from agency to agency, they can reasonably be expected to deal with operating experience for a year or more after full implementation. Agencies should develop systems of records that would allow them to answer questions such as:

1. How many financial grants have been awarded in accordance with section 5 of the Act? What was the dollar volume and what classes of recipients were involved (e.g., State governments, universities, hospitals, individuals)?

2. For which programs did the agency decide to use grants exclusively? Why?

3. How many financial assistance cooperative agreements have been awarded in accordance with section 6 of the Act? What was the dollar volume and what classes of recipients were involved?

4. For which programs did the agency decide to use cooperative agreements exclusively? What are the nature and reason for the agency involvement?

5. For which programs were both grants and cooperative agreements used? What were the criteria for determining the instrument used?

6. What types of nonmonetary assistance transfers were made as grants? What types as cooperative agreements?

7. What was the agency's experience in implementing sections 4, 5, and 6? How did it contribute to improved projects, management, or intergovernmental relations? What problems has the Act presented that can be expected to continue?

M. OMB REPORTING REQUIREMENTS

The experience of the agencies in making decisions necessary to implement sections 4, 5, and 6 of the Act will be important to the study required by section 8. In addition, to the more general questions about the feasibility of a comprehensive system of guidance for assistance activities, the report to Congress must include a summary of the effects of sections 4, 5, and 6. For these reasons, agencies are to provide by March 1, 1979, a report to OMB that includes the following:

1. Distinguishing between procurement and assistance:

a. For what types of activities did the agency have trouble making the distinction between procurement and assistance? Why?

b. On what basis were the issues resolved?

2. Use of procurement contracts:

a. What activities formerly funded through grants or other assistance instruments will now be handled with procurement contracts?

b. What is the anticipated dollar volume of these procurement contracts?

c. What is expected to be the impact of this shift on the agency?

d. Who will be the principal recipients of these contracts?

e. What is expected to be the impact on the recipients?

f. What use was made of the subsection 4(2) procurement provisions? Explain any uses other than those following the two-step example in the legislative history.

3. Agency decisions on when to use grants or cooperative agreements:

a. Describe the process by which the agency decided which programs would use:

(1) Only grants.

(2) Only cooperative agreements.

(3) Both grants and cooperative agreements.

b. Which programs, as listed in the Catalog of Federal Domestic Assistance, will fall into each of the above three categories? For those in category 3 what is the expected mix in terms of total dollars and numbers of transactions?

c. What programs not listed in the Catalog of Federal Domestic Assistance will fall into each of the three categories? For those in category 3 what is the expected mix in terms of total dollars and numbers of transactions?

d. What is the anticipated first-year dollar volume of the programs in each of the three categories?

e. What types of Federal involvement in the assisted activity led to the identification of programs that would use only cooperative agreements?

f. What are the anticipated reactions of the recipients of programs using only cooperative agreements?

g. What are the anticipated liability, accountability, and other implications for the programs using only cooperative agreements?

h. What are the agency guidelines on the selection of instruments for programs that may use either grants or cooperative agreements.

i. What is the anticipated dollar volume of grants and cooperative agreements to be awarded under these programs?

j. How will the opportunity to use either grants or cooperative agreements improve administration of these programs?

k. What negative effects are anticipated from the requirement to make a choice of instruments?

l. What programs will use assistance instruments that formerly used contracts and what is the dollar volume of these new uses of assistance instruments?

4. Nonmonetary assistance transfers:

a. What were the types and dollar value of nonmonetary transfers made by the agency using grant instruments?

b. How do these grant instruments compare with monetary grant instruments?

c. What were the types and dollar value of nonmonetary transfer made under the OMB exception that did not use grant instruments?

d. How would the agency have treated these transfers had not OMB granted the exception?

e. What were the types and dollar value of nonmonetary transfers made through cooperative agreements?

f. What was the agency's experience with this use of cooperative agreements?

5. Overall evaluation of the Act:

a. What elements of the Act are contributing to improved program performance and administration?

b. What elements of the Act are particularly troublesome? Why?

c. What proposals would the agency make for revising the Act?

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DoC FINANCIAL ASSISTANCE STANDARD TERMS AND CONDITIONS October 2001

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DEPARTMENT OF COMMERCE
FINANCIAL ASSISTANCE
STANDARD TERMS AND CONDITIONS



October 2001

DEPARTMENT OF COMMERCE
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PREFACE

The recipient and any subrecipients must, in addition to the assurances made as part of the application, comply and require each of its contractors and subcontractors employed in the completion of the project to comply with all applicable statutes, regulations, executive orders (EOs), Office of Management and Budget (OMB) circulars, terms and conditions, and approved applications.

This award is subject to the laws and regulations of the United States. Any inconsistency or conflict in terms and conditions specified in the award will be resolved according to the following order of precedence: public laws, regulations, applicable notices published in the Federal Register, EOs, OMB circulars, Department of Commerce (DoC) Financial Assistance Standard Terms and Conditions, agency standard award conditions (if any), and special award conditions. Special award conditions may take precedence over DoC standard terms and conditions, on a case-by-case basis, when allowed by the DoC standard term and condition.

Some of the DoC terms and conditions herein contain, by reference or substance, a summary of the pertinent statutes, or regulations published in the Federal Register or Code of Federal Regulations (CFR), EOs, OMB circulars or the assurances (Forms SF-424B,424D). To the extent that it is a summary, such provision is not in derogation of, or an amendment to, any such statute, regulation, EO, or OMB circular.

A. FINANCIAL REQUIREMENTS

.01 Financial Reports

a. The recipient shall submit a "Financial Status Report" (SF-269) on a semi-annual basis for the periods ending March 31 and September 30, or any portion thereof, unless otherwise specified in a special award condition. Reports are due no later than 30 days following the end of each reporting period. A final SF-269 shall be submitted within 90 days after the expiration date of the award.

b. Unless otherwise authorized by a special award condition, all financial reports shall be submitted in triplicate (one original and two copies) to the Grants Officer.

.02 Award Payments

a. The advance method of payment shall be authorized unless otherwise specified in a special award condition. The Grants Officer determines the appropriate method of payment. Payments will be made through electronic funds transfers directly to the recipient's bank account and in accordance with the requirements of the Debt Collection Improvement Act of 1996. The DoC Award Number must be included on all payment-related correspondence, information, and forms.

b. When the "Request for Advance or Reimbursement" (SF-270) is used to request

payment, the recipient shall submit the request no more frequently than monthly, and advances shall be approved for periods to cover only expenses anticipated over the next 30 days. When the SF-270 is used, the recipient must complete the SF-3881, "ACH Vendor Miscellaneous Payment Enrollment Form," and return it to the Grants Officer.

c. Advances shall be limited to the minimum amounts necessary to meet immediate disbursement needs. Advanced funds not disbursed in a timely manner must be promptly returned to DoC. If a recipient demonstrates an unwillingness or inability to establish procedures which will minimize the time elapsing between the transfer of funds and disbursement or if the recipient otherwise fails to continue to qualify for the advance method of payment, the Grants Officer may change the method of payment to reimbursement only.

.03 Federal and Non-Federal Sharing

a. Awards which include Federal and non-Federal sharing incorporate an estimated budget consisting of shared allowable costs. If actual allowable costs are less than the total approved estimated budget, the Federal and non-Federal cost share ratio shall be calculated as a percentage of Federal and non-Federal approved amounts. If actual allowable costs are greater than the total approved estimated budget, the Federal share shall not exceed the total Federal dollar amount as reflected in the Financial Assistance Award (CD-450) and Amendment(s) to Financial Assistance Award (CD-451).

b. The non-Federal share, whether in cash or in-kind, is expected to be paid out at the same general rate as the Federal share. Exceptions to this requirement may be granted by the Grants Officer based on sufficient documentation demonstrating previously determined plans for or later commitment of cash or in-kind contributions. In any case, the recipient must meet its cost share commitment over the life of the award.

.04 Budget Changes and Transfer of Funds Among Categories

a. Requests for budget changes to the approved estimated budget in accordance with the provision noted below must be submitted to the Grants Officer who shall make the final determination on such requests and notify the recipient in writing.

b. Transfers of funds by the recipient among direct cost categories are permitted for awards in which the Federal share of the project is $100,000 or less. For awards in which the Federal share of the project exceeds $100,000, transfers of funds must be approved in writing by the Grants Officer when the cumulative amount of such transfers exceed 10 percent of the current total Federal and non-Federal funds authorized by the Grants Officer. The 10 percent threshold applies to the total Federal and non-Federal funds authorized by the Grants Officer at the time of the

transfer request. This is the accumulated amount of Federal funding obligated to date by the Grants Officer along with any non-Federal share. The same criteria applies to the cumulative amount of transfer of funds among projects, functions, joint ventures, consortia, activities, and annual costs when budgeted separately within an award. Transfers will not be permitted if such transfers would cause any Federal appropriation, or part thereof, to be used for purposes other than those intended. This transfer authority does not authorize the recipient to create new budget categories within an approved budget unless the Grants Officer has provided prior approval.

c. The recipient is not authorized at any time to transfer amounts budgeted for direct costs to the indirect costs line item or vice versa, without written prior approval of the Grants Officer.

.05 Indirect Costs

a. Indirect costs will not be allowable charges against the award unless specifically included as a line item in the approved budget incorporated into the award. (The term "indirect cost" has been replaced with the term "facilities and administrative costs" under OMB Circular A-21, "Cost Principles for Educational Institutions.")

b. Excess indirect costs may not be used to offset unallowable direct costs.

c. If the recipient has not previously established an indirect cost rate with a Federal agency, the negotiation and approval of a rate is subject to the procedures in the applicable cost principles and the following subparagraphs:

1. For those organizations for which DoC is cognizant or has oversight, DoC or its designee either will negotiate a fixed rate for the recipient or, in some instances, will limit its review to evaluating the procedures described in the recipient's cost allocation methodology plan. Indirect cost rates and cost allocation methodology reviews are subject to future audits to determine actual indirect costs. Within 90 days of the award start date, the recipient shall submit to the address listed below documentation (indirect cost proposal, cost allocation plan, etc.) necessary to perform the review. The recipient shall provide the Grants Officer with a copy of the transmittal letter.

Office of Executive Assistance Management
Department of Commerce
14th Street and Constitution Avenue, N.W., Room H-6022
Washington, DC 20230

2. When an oversight or cognizant Federal agency other than DoC has responsibility for establishing an indirect cost rate, the recipient shall submit to that oversight or cognizant Federal agency within 90 days of the award start date the documentation (indirect cost proposal, cost allocation plan, etc.) necessary to establish such rates. The recipient shall provide the Grants Officer with a copy of the transmittal letter to the cognizant Federal agency.

3. If the recipient fails to submit the required documentation to DoC or other oversight or cognizant Federal agency within 90 days of the award start date, the Grants Officer may amend the award to preclude the recovery of any indirect costs under the award. If the DoC, oversight, or cognizant Federal agency determines there is a finding of good and sufficient cause to excuse the recipient's delay in submitting the documentation, an extension of the 90-day due date may be approved by the Grants Officer.

4. Regardless of any approved indirect cost rate applicable to the award, the maximum dollar amount of allocable indirect costs for which DoC will reimburse the recipient shall be the lesser of:

   (a) The line item amount for the Federal share of indirect costs contained in the approved budget of the award; or

   (b) The Federal share of the total allocable indirect costs of the award based on the indirect cost rate approved by a cognizant or oversight Federal agency and current at the time the cost was incurred, provided the rate is approved on or before the award end date.

.06 Incurring Costs or Obligating Federal Funds Beyond the Expiration Date

a. The recipient shall not incur costs or obligate funds for any purpose pertaining to the operation of the project, program, or activities beyond the expiration date stipulated in the award. The only costs which are authorized for a period of up to 90 days following the award expiration date are those strictly associated with closeout activities. Closeout activities are normally limited to the preparation of final progress, financial, and required project audit reports unless otherwise approved in writing by the Grants Officer.

b. Unless otherwise authorized in 15 CFR § 14.25(e)(4) or a special award condition, any extension of the award period can only be authorized by the Grants Officer in writing. Verbal or written assurances of funding from other than the Grants Officer shall not constitute authority to obligate funds for programmatic activities beyond the expiration date.

c. The DoC has no obligation to provide any additional prospective funding. Any amendment of the award to increase funding and to extend the period of performance is at the sole discretion of DoC.

.07 Tax Refunds

Refunds of FICA/FUTA taxes received by the recipient during or after the award period must be refunded or credited to DoC where the benefits were financed with Federal funds under the award. The recipient agrees to contact the Grants Officer immediately upon receipt of these refunds. The recipient further agrees to refund

portions of FICA/FUTA taxes determined to belong to the Federal Government, including refunds received after the award end date.

B. PROGRAMMATIC REQUIREMENTS

.01 Performance (Technical) Reports

a. The recipient shall submit performance (technical) reports in triplicate (one original and two copies) to the Federal Program Officer in the same frequency as the Financial Status Report (SF-269) unless otherwise authorized by the Grants Officer.

b. Unless otherwise specified in the award provisions, performance (technical) reports shall contain brief information as prescribed in the applicable uniform administrative requirements incorporated into the award.

.02 Unsatisfactory Performance

Failure to perform the work in accordance with the terms of the award and maintain at least a satisfactory performance rating or equivalent evaluation may result in designation of the recipient as high risk and assignment of special award conditions or other further action as specified in the standard term and condition entitled "Non-Compliance With Award Provisions."

.03 Programmatic Changes

a. The recipient shall not make any programmatic changes to the award without prior written approval by the Grants Officer.

b. Any requests by the recipient for programmatic changes must be submitted to the Grants Officer who shall make the final determination and notify the recipient in writing.

.04 Other Federal Awards with Similar Programmatic Activities

The recipient shall immediately provide written notification to the Federal Program Officer and the Grants Officer in the event that, subsequent to receipt of the DoC award, other financial assistance is received to support or fund any portion of the scope of work incorporated into the DoC award. DoC will not pay for costs that are funded by other sources.

.05 Non-Compliance With Award Provisions

Failure to comply with any or all of the provisions of the award may have a negative impact on future funding by DoC and may be considered grounds for any or all of the following actions: establishment of an account receivable, withholding payments under any DoC awards to the recipient, changing the method of payment from advance to reimbursement only, or the imposition of other special award conditions, suspension of any DoC active awards, and termination of any DoC active awards.

.06 Prohibition Against Assignment by the Recipient

Notwithstanding any other provision of the award, the recipient shall not transfer, pledge, mortgage, or otherwise assign the award, or any interest therein, or any claim arising thereunder, to any party or parties, banks, trust companies, or other financing or financial institutions.

.07 Disclaimer Provisions

a. The United States expressly disclaims any and all responsibility or liability to the recipient or third persons for the actions of the recipient or third persons resulting in death, bodily injury, property damages, or any other losses resulting in any way from the performance of this award or any other losses resulting in any way from the performance of this award or any subaward or subcontract under this award.

b. The acceptance of this award by the recipient does not in any way constitute an agency relationship between the United States and the recipient.

C. NON-DISCRIMINATION REQUIREMENTS

No person in the United States shall, on the ground of race, color, national origin, handicap, age, religion, or sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance. The recipient agrees to comply with the non-discrimination requirements below:

.01 Statutory Provisions

a. Title VI of the Civil Rights Act of 1964 (42 USC §§ 2000d et seq.) and DoC implementing regulations published at 15 CFR Part 8 which prohibit discrimination on the grounds of race, color, or national origin under programs or activities receiving Federal financial assistance;

b. Title IX of the Education Amendments of 1972 (20 USC §§ 1681 et seq.) prohibiting discrimination on the basis of sex under Federally assisted education programs or activities;

c. Section 504 of the Rehabilitation Act of 1973, as amended (29 USC § 794) and DoC implementing regulations published at 15 CFR Part 8b prohibiting discrimination on the basis of handicap under any program or activity receiving or benefitting from Federal assistance;

d. The Age Discrimination Act of 1975, as amended (42 USC §§ 6101 et seq.) and DoC implementing regulations published at 15 CFR Part 20 prohibiting discrimination on the basis of age in programs or activities receiving Federal financial assistance;

e. The Americans with Disabilities Act of 1990 (42 USC §§ 12101 et seq.) prohibiting discrimination on the basis of disability under programs, activities, and services provided or made available by state and local governments or instrumentalities or agencies thereto, as well as public or private entities that provide public transportation;

f. Any other applicable non-discrimination law(s).

.02 Other Provisions

Parts II and III of EO11246 (30 FR 12319, 1965) as amended by EO 11375 (32 FR 14303, 1967) and 12086 (43 FR 46501, 1978) require Federally assisted construction contracts to include the nondiscrimination provisions of §§ 202 and 203 of that EO and Department of Labor regulations implementing EO 11246 (41 CFR § 60-1.4(b), 1991).

D. AUDITS

Under the Inspector General Act of 1978, as amended, 5 USC App. 3,§ 1 et seq., an audit of the award may be conducted at any time. The Inspector General of the DoC, or any of his or her duly authorized representatives, shall have access to any pertinent books, documents, papers and records of the recipient, whether written, printed, recorded, produced or reproduced by any electronic, mechanical, magnetic or other process or medium, in order to make audits, inspections, excerpts, transcripts or other examinations as authorized by law. When the OIG requires a program audit on a DoC award, the OIG will usually make the arrangements to audit the award, whether the audit is performed by OIG personnel, an independent accountant under contract with DoC, or any other Federal, state or local audit entity.

.01 Organization-Wide, Program-Specific, and Project Audits

a. Organization-wide or program-specific audits shall be performed in accordance with the Single Audit Act Amendments of 1996, as implemented by OMB Circular A-133, "Audits of States, Local Governments, and Non-Profit Organizations." Recipients that are subject to the provisions of OMB Circular A-133 and that expend $300,000 or more in a year in Federal awards shall have an audit conducted for that year in accordance with the requirements contained in OMB Circular A-133.

b. Pursuant to 15 CFR § 14.26 (c) and (d), DoC requires for-profit recipients of awards that exceed $100,000 in Federal funding to have a program-specific audit performed. If DoC does not have a program-specific audit guide available for the program, the auditor should follow Generally Accepted Government Auditing Standards and the requirements for a program-specific audit as described in OMB Circular A-133 § .235. A copy of the program-specific audit shall be submitted to the OIG at the following address with a copy of the transmittal letter to the Grants Officer:

Office of Inspector General
U.S. Department of Commerce
Atlanta Regional Office of Audits
401 West Peachtree Street, N.W., Suite 2742
Atlanta, GA 30308

c. Recipients expending Federal awards over $300,000 a year and having audits conducted in accordance with OMB Circular A-133 shall submit a copy of organization-wide or program-specific audits to the Bureau of the Census, which has been designated by OMB as a central clearinghouse. The address is:

Federal Audit Clearinghouse
Bureau of the Census
1201 E. 10th Street
Jeffersonville, IN 47132

.02 Audit Resolution Process

a. An audit of the award may result in the disallowance of costs incurred by the recipient and the establishment of a debt (account receivable) due DoC. For this reason, the recipient should take seriously its responsibility to respond to all audit findings and recommendations with adequate explanations and supporting evidence whenever audit results are disputed.

b. In accordance with the Federal Register notice dated January 27, 1989 (54 FR 4053), a recipient whose award is audited has the following opportunities to dispute the proposed disallowance of costs and the establishment of a debt:

1. Unless the Inspector General determines otherwise, the recipient has 30 days from the date of the transmittal of the draft audit report to submit written comments and documentary evidence.

2. The recipient has 30 days from the date of the transmittal of the final audit report to submit written comments and documentary evidence. There will be no extension of this deadline.

3. The DoC shall review the documentary evidence submitted by the recipient and shall notify the recipient of the results in an Audit Resolution Determination Letter. The recipient has 30 days from the date of receipt of the Audit Resolution Determination Letter to submit a written appeal. There will be no extension of this deadline. The appeal is the last opportunity for the recipient to submit written comments and documentary evidence that dispute the validity of the audit resolution determination. In addition, an appeal does not preclude the recipient's obligation to pay a debt that may be established, nor does the appeal preclude the accrual of interest on a debt.

4. The DoC shall review the recipient's appeal and notify the recipient of the results in an Appeal Determination Letter. After the opportunity to appeal has expired or after the appeal determination has been rendered, DoC will not accept any further documentary evidence from the recipient. No other administrative appeals are available in DoC.

5. An appeal of the Audit Resolution Determination does not prevent the establishment of the audit-related debt nor does it prevent the accrual of interest on the debt. If the Audit Resolution Determination is overruled or modified on appeal, appropriate corrective action will be taken retroactively. An appeal will stay the offset of funds owed by the auditee against funds due to the auditee.

E. DEBTS

.01 Payment of Debts Owed the Federal Government

Any debts determined to be owed the Federal Government shall be paid promptly by the recipient. In accordance with 15 CFR § 21.4, a debt will be considered delinquent if it is not paid within 15 days of the due date, or if there is no due date, within 30 days of the billing date. Failure to pay a debt by the due date, or if there is no due date, within 30 days of the billing date, shall result in the imposition of late payment charges as noted below. In addition, failure to pay the debt or establish a repayment agreement by the due date, or if there is no due date, within 30 days of the billing date, will also result in the referral of the debt for collection action and may result in DoC taking further action as specified in the standard term and condition entitled "Non-Compliance With Award Provisions." Funds for payment of a debt must not come from other Federally sponsored programs. Verification that other Federal funds have not been used will be made, e.g., during on-site visits and audits.

.02 Late Payment Charges

a. An interest charge shall be assessed on the delinquent debt as established by the Debt Collection Act (31 U.S.C. 3701 et seq.), as amended. The minimum annual interest rate to be assessed is the Department of the Treasury's Current Value of Funds Rate. This rate is published in the Federal Register by the Department of the Treasury. The assessed rate shall remain fixed for the duration of the indebtedness.

b. A penalty charge shall be assessed on any portion of a debt that is delinquent for more than 90 days, although the charge will accrue and be assessed from the date the debt became delinquent.

c. An administrative charge shall be assessed to cover processing and handling the amount due.

d. State and local governments are not subject to penalty and administrative charges.

F. NAME CHECK

A name check review shall be performed by the OIG on key individuals associated with non-profit and for-profit organizations, unless an exemption has been authorized by the Inspector General, such as the exemption authorized for Economic Development Districts designated by the Economic Development Administration.

.01 Results of Name Check

DoC reserves the right to take any of the actions described in section F.02 if any of the following occurs as a result of the name check review:

a. A key individual fails to submit the required Form CD-346, “Applicant for Funding Assistance;”

b. A key individual made an incorrect statement or omitted a material fact on the Form CD-346; or

c. The name check reveals significant adverse findings that reflect on the business integrity or responsibility of the recipient and/or key individual.

.02 Action(s) Taken as a Result of Name Check Review

If any situation noted in F.01 occurs, DoC, at its discretion, may take one or more of the following actions:

a. Consider suspension/termination of the award;

b. Require the removal of any key individual from association with the management

of and/or implementation of the award; and/or

c. Make appropriate provisions or revisions with respect to the method of payment and/or financial reporting requirements.

G. GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT)

The recipient shall comply with the provisions of EO 12549, "Debarment and Suspension" and DoC's implementing regulations published at 15 CFR Part 26, Subparts A through E, "Governmentwide Debarment and Suspension (Nonprocurement)," which generally prohibit entities that have been debarred, suspended, or voluntarily excluded from participating in Federal nonprocurement transactions either through primary or lower tier covered transactions.

H. DRUG-FREE WORKPLACE

The recipient shall comply with the provisions of Public Law 100-690, Title V, Subtitle D, "Drug-Free Workplace Act of 1988," and DoC implementing regulations published at 15 CFR Part 26, Subpart F, "Governmentwide Requirements for Drug-Free Workplace (Grants)," which require that the recipient take steps to provide a drug-free workplace.

I. LOBBYING RESTRICTIONS

.01 Statutory Provisions

The recipient shall comply with the provisions of Section 319 of Public Law 101-121, which added Section 1352 to Chapter 13 of Title 31 of the United States Code, and DoC implementing regulations published at 15 CFR Part 28, "New Restrictions on Lobbying." These provisions generally prohibit the use of Federal funds for lobbying the Executive or Legislative Branches of the Federal government in connection with the award, and require the disclosure of the use of non-Federal funds for lobbying.

.02 Disclosure of Lobbying Activities

The recipient receiving in excess of $100,000 in Federal funding shall submit a completed Form SF-LLL, "Disclosure of Lobbying Activities," regarding the use of non-Federal funds for lobbying. The Form SF-LLL shall be submitted within 30 days following the end of the calendar quarter in which there occurs any event that requires disclosure or that materially affects the accuracy of the information contained in any disclosure form previously filed. The recipient must submit the Forms SF-LLL, including those received from subrecipients, contractors, and subcontractors, to the Grants Officer.

J. CODES OF CONDUCT AND SUBAWARD, CONTRACT, AND SUBCONTRACT PROVISIONS

.01 Code of Conduct for Recipients

Pursuant to the certification in SF-424B, paragraph 3, the recipient must maintain written standards of conduct to establish safeguards to prohibit employees from using their positions for a purpose that constitutes or presents the appearance of personal or organizational conflict of interest, or personal gain in the administration of this award.

.02 Applicability of Award Provisions to Subrecipients

The recipient shall require all subrecipients, including lower tier subrecipients, under the award to comply with the provisions of the award including applicable cost principles, administrative, and audit requirements.

.03 Competition and Codes of Conduct for Subawards

a. All subawards will be made in a manner to provide, to the maximum extent practicable, open and free competition. The recipient must be alert to organizational conflicts of interest as well as other practices among subrecipients that may restrict or eliminate competition. In order to ensure objective subrecipient performance and eliminate unfair competitive advantage, subrecipients that develop or draft work requirements, statements of work, or requests for proposals shall be excluded from competing for such subawards.

b. The recipient shall maintain written standards of conduct governing the performance of its employees engaged in the award and administration of subawards. No employee, officer, or agent shall participate in the selection, award, or administration of a subaward supported by Federal funds if a real or apparent conflict of interest would be involved. Such a conflict would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization in which he/she serves as an officer or which employs or is about to employ any of the parties mentioned in this section, has a financial interest or other interest in the organization selected or to be selected for a subaward. The officers, employees, and agents of the recipient shall neither solicit nor accept anything of monetary value from subrecipients. However, the recipient may set standards for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value. The standards of conduct shall provide for disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the recipient.

c. A financial interest may include employment, stock ownership, a creditor or debtor relationship, or prospective employment with the organization selected or to be selected for a subaward. An appearance of impairment of objectivity could result from an organizational conflict where, because of other activities or relationships with other persons or entities, a person is unable or potentially unable to render impartial assistance or advice. It could also result from non-financial gain to the individual, such as benefit to reputation or prestige in a professional field.

.04 Applicability of Provisions to Subawards, Contracts, and Subcontracts

a. The recipient shall include the following notice in each request for applications or bids:

> Applicants/bidders for a lower tier covered transaction (except for goods and services under the $100,000 simplified acquisition threshold and where the lower tier recipient will have no critical influence on or substantive control over the award) are subject to 15 CFR Part 26, Subparts A through E, "Governmentwide Debarment and Suspension (Nonprocurement). In addition, applicants/bidders for a lower tier covered transaction for a subaward, contract, or subcontract greater than $100,000 of Federal funds at any tier are subject to 15 CFR Part 28, "New Restrictions on Lobbying." Applicants/bidders should familiarize themselves with these provisions, including the certification requirements. Therefore, applications for a lower tier covered transaction must include a Form CD-512, "Certifications Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion--Lower Tier Covered Transactions and Lobbying," completed without modification.

b. The recipient shall include a statement in all lower tier covered transactions (subawards, contracts, and subcontracts), that the award is subject to EO 12549, "Debarment and Suspension" and DoC implementing regulations published at 15 CFR Part 26, Subparts A through E, "Governmentwide Debarment and Suspension (Nonprocurement)."

c. The recipient shall include a statement in all lower tier covered transactions (subawards, contracts, and subcontracts) exceeding $100,000 in Federal funds, that the subaward, contract, or subcontract is subject to Section 319 of Public Law 101-121, which added Section 1352, regarding lobbying restrictions, to Chapter 13 of Title 31 of the United States Code as implemented at 15 CFR Part 28, "New Restrictions on Lobbying." The recipient shall further require the subrecipient, contractor, or subcontractor to submit a completed "Disclosure of Lobbying Activities" (Form SF-LLL) regarding the use of non-Federal funds for lobbying. The Form SF-LLL shall be submitted within 15 days following the end of the calendar quarter in which there occurs any event that requires disclosure or that materially affects the accuracy of the information contained in any disclosure form previously filed. The Form SF-LLL shall be submitted from tier to tier until received by the recipient. The recipient must submit all disclosure forms received, including those that report lobbying activity on its own behalf, to the Grants Officer within 30 days following the end of the calendar quarter.

.05 Minority Owned Business Enterprise

DoC encourages recipients to utilize minority and women-owned firms and enterprises in contracts under financial assistance awards. The Minority Business Development Agency will assist recipients in matching qualified minority owned enterprises with contract opportunities. For further information contact:

U.S. Department of Commerce
Minority Business Development Agency
Herbert C. Hoover Building
14th Street and Constitution Avenue, N.W.
Washington, D.C. 20230

.06 Subaward and/or Contract to a Federal Agency

a. The recipient, subrecipient, contractor, and/or subcontractor shall not sub-grant or sub-contract any part of the approved project to any agency or employee of DoC and/or other Federal department, agency or instrumentality, without the prior written approval of the Grants Officer.

b. Requests for approval of such action must be submitted to the Federal Program Officer who shall review and make a recommendation to the Grants Officer. The Grants Officer shall make the final determination and will notify the recipient in writing of the final determination.

K. PROPERTY

.01 Standards

The recipient shall comply with the property management standards as stipulated in the applicable uniform administrative requirements.

.02 Real Property

The recipient shall record liens or other appropriate notices of record to indicate that real property has been acquired or improved with Federal funds and that disposition conditions apply to the property.

L. MISCELLANEOUS REQUIREMENTS

.01 Criminal and Prohibited Activities.

a. The Program Fraud Civil Remedies Act (31 U.S.C. §§ 3801-3812), provides for the imposition of civil penalties against persons who make false, fictitious, or fraudulent claims to the Federal government for money (including money representing grants, loans or other benefits).

b. False statements (18 U.S.C. §§ 287 and 1001), provides that whoever makes or presents any false, fictitious, or fraudulent statements, representations, or claims against the United States shall be subject to imprisonment of not more than five years and shall be subject to a fine in the amount provided by 18 U.S.C. § 287.

c. False Claims Act (31 U.S.C. 3729 et seq.), provides that suits under this act can be brought by the government, or a person on behalf of the government, for false claims under Federal assistance programs.

d. Copeland "Anti-Kickback" Act (18 U.S.C. § 874 and 40 U.S.C. § 276c), prohibits a person or organization engaged in a Federally supported project from enticing an employee working on the project from giving up a part of his compensation under an employment contract.

.02 Foreign Travel

a. The recipient shall comply with the provisions of the Fly America Act (49 USC § 40118). The implementing regulations of the Fly America Act are found at 41 CFR §§ 301-10.131 through 301-10.143.

b. The Fly America Act requires that Federal travelers and others performing U.S. Government-financed foreign air travel must use U.S. flag air carriers, to the extent that service by such carriers is available. Foreign air carriers may be used only in specific instances, such as when a U.S. flag air carrier is unavailable, or use of U.S. flag air carrier service will not accomplish the agency's mission.

c. Use of foreign air carriers may also be used only if bilateral agreements permit such travel pursuant to 49 USC § 40118(b). DoC is not aware of any bilateral agreements which meet these requirements. Therefore, it is the responsibility of the recipient to provide the Grants Officer with a copy of the applicable bilateral agreement if use of a foreign carrier under a bilateral agreement is anticipated.

d. If a foreign air carrier is anticipated to be used for any part of foreign travel, the recipient must receive prior approval from the Grants Officer. When requesting such approval, the recipient must provide a justification in accordance with guidance provided by 41 CFR § 301-10.142, which requires the recipient to provide the Grants Officer with the following: name; dates of travel; origin and destination of travel; detailed itinerary of travel, name of the air carrier and flight number for each leg of the trip; and a statement explaining why the recipient meets one of the exceptions to the regulations. If the use of a foreign air carrier is pursuant to a bilateral agreement, the recipient must provide the Grants Officer with a copy of the agreement. The Grants Officer shall make the final determination and notify the recipient in writing. Failure to adhere to the provisions of the Fly America Act will result in the recipient not being reimbursed for any transportation costs for which the recipient improperly used a foreign air carrier.

.03 American-Made Equipment and Products.

Recipients are hereby notified that they are encouraged, to the greatest extent practicable, to purchase American-made equipment and products with funding provided under this award.

.04 Intellectual Property Rights

a. Inventions.

The rights to any invention made by a recipient under a DoC financial assistance award are determined by the Bayh-Dole Act, Pub. L. 96-517, as amended, and codified in 35 U.S.C. § 200 et seq, except as otherwise required by law. The specific rights and responsibilities are described in more detail in 37 CFR Part 401 and in particular, in the standard patent rights clause in 37 CFR § 401.14.

1. Ownership.

   (a) Recipient. The recipient has the right to own any invention it makes (conceived or first reduced to practice) or made by its employees. The recipient may not assign its rights to a third party without the permission of DoC unless it is to a patent management organization (i.e., a university's Research Foundation.) The recipient's ownership rights are subject to the Government's nonexclusive paid-up license.

   (b) Department. If the recipient elects not to own or does not elect rights or file a patent application within the time limits set forth in the standard patent rights clause, DoC may request an assignment of all rights, which is normally subject to a limited royalty free nonexclusive license for the recipient. DoC owns any invention made solely by its employees but may license the recipient in accordance with the procedures in 37 CFR Part 404.

   (c) Inventor/Employee. If neither the recipient nor the Department is interested in owning an invention by a recipient employee, the recipient, with the written concurrence of DoC Patent Counsel, may allow the inventor/employee to own the invention subject to certain restrictions as described in 37 CFR § 401.9.

   (d) Joint inventions. Inventions made jointly by a recipient and a DoC employee will be owned jointly by the recipient and DoC. However, DoC may transfer its rights to the recipient as authorized by 35 U.S.C. § 202(e) and 37 CFR § 401.10 if the recipient is willing to patent and license the invention in exchange for a share of "net" royalties based on the number of inventors (e.g., 50-50 if there is one recipient and DoC employee). The agreement will be prepared by DoC Patent Counsel and may include other provisions, such as a royalty free license to the Government and certain other entities.

2. Responsibilities.

   The recipient has responsibilities and duties set forth in the standard patent rights clause, which are not described below. The recipient is expected to comply with all the requirements of the standard patent rights clause and 37 CFR Part 401.

   (a) Reporting. Within two months of when the recipient reports the invention, the recipient will send the invention disclosure to DoC Patent

Counsel (HCHB Room 4613, Washington, DC 20230, telephone: 202-482-8097) and the appropriate DoC program office.

(b) Electing. Within two years of reporting the invention to DoC, the recipient will notify DoC Patent Counsel of its decision whether or not it wishes to own the invention.

(c) Filing. Within one year of notifying DoC that it wishes to own the invention, the recipient will file a patent application (either a provisional or non-provisional) and promptly send a copy of the application to DoC Patent Counsel. Any foreign or international application must usually be filed within 10 months of the first filed application in the United States. The recipient will ensure that any U.S. application contains the required statement of Government support. The recipient will also promptly send the required confirmatory Government license to DoC Patent Counsel who shall record that license in the Patent and Trademark Office. If the recipient decides to discontinue the prosecution of any patent application or not pay a maintenance fee or defend a reexamination, it shall notify DoC Patent Counsel of that fact in sufficient time (but not less than 30 days) for the Government to respond to any outstanding requirement or letter from a patent office. However, if the recipient is filing a continuing application, it needs only to notify DoC Patent Counsel of this and provide a copy of the continuing application with the appropriate confirmatory license. Upon issuance of any application, the recipient will promptly provide a copy of the patent to DoC Patent Counsel.

(d) The recipient should send any request for an extension of time to DoC Patent Counsel in advance of the expiration of the time period.

b. Patent Notification Procedures.

Pursuant to EO 12889, DoC is required to notify the owner of any valid patent covering technology whenever the DoC or its financial assistance recipients, without making a patent search, knows (or has demonstrable reasonable grounds to know) that technology covered by a valid United States patent has been or will be used without a license from the owner. To ensure proper notification, if the recipient uses or has used patented technology under this award without a license or permission from the owner, the recipient must notify the DoC Patent Counsel at the following address, with a copy to the Grants Officer:

Department of Commerce
Office of Chief Counsel for Technology, Patent Counsel
14th Street and Constitution Avenue, N.W. Room H-4613
Washington, D.C. 20230

c. Data, Databases, and Software.

The rights to any work produced or purchased under a DoC Federal financial assistance award are determined by 15 CFR § 24.34 and 15 CFR § 14.36 . Such works may include data, databases or software. The recipient owns any work produced or purchased under a DoC Federal financial assistance award subject to DoC's right to obtain, reproduce, publish or otherwise use the work or authorize others to receive, reproduce, publish or otherwise use the data for Government purposes.

d. Copyright.

The recipient may copyright any work produced under a DoC Federal financial assistance award subject to DoC's royalty-free nonexclusive and irrevocable right to reproduce, publish or otherwise use the work or authorize others to do so for Government purposes. Works jointly authored by DoC and recipient employees may be copyrighted but only the part authored by the recipient is protected because, under 17 U.S.C. § 105, works produced by Government employees are not copyrightable in the United States. If the contributions of the authors cannot be separated, the copyright status of the joint work is questionable. On occasion, DoC may ask the recipient to transfer to DoC its copyright in a particular work when DoC is undertaking the primary dissemination of the work. Ownership of copyright by the Government through assignment is permitted by 17 U.S.C. § 105.

.05 Increasing Seat Belt Use in the United States.

Pursuant to EO 13043, recipients should encourage employees and contractors to enforce on-the-job seat belt policies and programs when operating company-owned, rented or personally-owned vehicles.

.06 Research Involving Human Subjects.

a. All proposed research involving human subjects must be conducted in accordance with 15 CFR Part 27, "Protection of Human Subjects." No research involving human subjects is permitted under any DoC financial assistance award unless expressly authorized by the Grants Officer.

b. No research involving human subjects is permitted under this award unless expressly authorized by Special Award Condition, or otherwise in writing by the Grants Officer.

c. Federal policy defines a human subject as a living individual about whom an investigator conducting research obtains (1) data through intervention or interaction with the individual, or (2) identifiable private information. Research means a systematic investigation, including research development, testing and evaluation, designed to develop or contribute to generalizable knowledge.

d. DoC regulations, 15 CFR Part 27, require that recipients maintain appropriate policies and procedures for the protection of human subjects. In the event it becomes evident that human subjects may be involved in this project, the recipient shall submit appropriate documentation to the Federal Program Officer for approval by the appropriate DoC officials. This documentation may include:

1. Documentation establishing approval of the project by an institutional review board (IRB) approved for Federal-wide use under Department of Health and Human Services guidelines, see 15 CFR § 27.103;

2. Documentation to support an exemption for the project under 15 CFR § 27.101(b);

3. Documentation to support deferral for an exemption or IRB review under 15 CFR § 27.118;

4. Documentation of IRB approval of any modification to a prior approved protocol or to an informed consent form.

e. No work involving human subjects may be undertaken, conducted, or costs incurred and/or charged for human subjects research, until the appropriate documentation is approved in writing by the Grants Officer. Notwithstanding this prohibition, work may be initiated or costs incurred and/or charged to the project for protocol or instrument development related to human subjects research.

.07 Federal Employee Expenses.

Federal agencies are generally barred from accepting funds from a recipient to pay transportation, travel, or other expenses for any Federal employee unless specifically approved in the terms of the award. Use of award funds (Federal or non-Federal) or the recipient's provision of in-kind goods or services, for the purposes of transportation, travel, or any other expenses for any Federal employee may raise appropriation augmentation issues. In addition, DoC policy prohibits the acceptance of gifts, including travel payments for Federal employees, from recipients or applicants regardless of the source.

.08 Preservation of Open Competition and Government Neutrality Towards Government Contractors' Labor Relations on Federal and Federally Funded Construction Projects.

Pursuant to EO 13202, "Preservation of Open Competition and Government Neutrality Towards Government Contractors' Labor Relations on Federal and Federally Funded Construction Projects," unless the project is exempted under section 5(c) of the order, bid specifications, project agreements, or other controlling documents for construction contracts awarded by recipients of grants or cooperative agreements, or those of any construction manager acting on their behalf, shall not: a) include any requirement or prohibition on bidders, offerors, contractors, or

subcontractors about entering into or adhering to agreements with one or more labor organizations on the same or related construction project(s); or b) otherwise discriminate against bidders, offerors, contractors, or subcontractors for becoming or refusing to become or remain signatories or otherwise to adhere to agreements with one or more labor organizations, on the same or other related construction project(s).

.09 Minority Serving Institutions (MSIs) Initiative.

Pursuant to EOs 12876, 12900, and 13021, DoC is strongly committed to broadening the participation of MSIs in its financial assistance programs. DoC's goals include achieving full participation of MSIs in order to advance the development of human potential, strengthen the Nation's capacity to provide high-quality education, and increase opportunities for MSIs to participate in and benefit from Federal financial assistance programs. DoC encourages all applicants and recipients to include meaningful participation of MSIs. Institutions eligible to be considered MSIs are listed on the Department of Education website.

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The recipient and any subrecipients must, in addition to the assurances made as part of the application, comply and require each of its contractors and subcontractors employed in the completion of the project to comply with all applicable statutes, regulations, executive orders (EOs), Office of Management and Budget (OMB) circulars, terms and conditions, and approved applications.

This award is subject to the laws and regulations of the United States. Any inconsistency or conflict in terms and conditions specified in the award will be resolved according to the following order of precedence: public laws, regulations, applicable notices published in the Federal Register, EOs, OMB circulars, Department of Commerce (DoC) Financial Assistance Standard Terms and Conditions, agency standard award conditions (if any), and special award conditions. Special award conditions may amend or take precedence over DoC standard terms and conditions, on a case-by-case basis, when allowed by the DoC standard term and condition.

Some of the DoC terms and conditions herein contain, by reference or substance, a summary of the pertinent statutes, or regulations published in the Federal Register or Code of Federal Regulations (CFR), EOs, OMB circulars or the assurances (Forms SF-424B, 424D). To the extent that it is a summary, such provision is not in derogation of, or an amendment to, any such statute, regulation, EO, or OMB circular.

A. FINANCIAL REQUIREMENTS

.01 Financial Reports

a. The recipient shall submit a "Financial Status Report" (SF-269) on a semi-annual basis for the periods ending March 31 and September 30, or any portion thereof, unless otherwise specified in a special award condition. Reports are due no later than 30 days following the end of each reporting period. A final SF-269 shall be submitted within 90 days after the expiration date of the award.

b. Unless otherwise authorized by a special award condition, all financial reports shall be submitted in triplicate (one original and two copies) to the Grants Officer.

.02 Award Payments

a. The advance method of payment shall be authorized unless otherwise specified in a special award condition. The Grants Officer determines the

appropriate method of payment. Payments will be made through electronic funds transfers directly to the recipient's bank account and in accordance with the requirements of the Debt Collection Improvement Act of 1996 and the Cash Management Improvement Act. The DoC Award Number must be included on all payment-related correspondence, information, and forms.

b. When the "Request for Advance or Reimbursement" (SF-270) is used to request payment, the recipient shall submit the request no more frequently than monthly, and advances shall be approved for periods to cover only expenses anticipated over the next 30 days. When the SF-270 is used, the recipient must complete the SF-3881, "ACH Vendor Miscellaneous Payment Enrollment Form," and return it to the Grants Officer.

c. DoC will begin using the Department of Treasury's Automated Standard application for Payment (ASAP) system. Under the ASAP system, payments will be made through preauthorized electronic funds transfers, in accordance with the requirements of the Debt Collection Improvement Act of 1996. In order to receive payments under ASAP, recipients will be required to enroll with the Department of Treasury, Financial Management Service, Regional Financial Centers, which allows them to use the on-line and Voice Response System (VRS) method of withdrawing funds from their ASAP established accounts. Recipients enrolled in the ASAP system do not need to submit a "Request for Advance or Reimbursement" (SF-270), for payments relating to their award. Awards that will be paid under the ASAP system will contain a special award condition, clause, or provision describing enrollment requirements and any controls or withdrawal limits set in the ASAP system.

d. Advances shall be limited to the minimum amounts necessary to meet immediate disbursement needs, but in no case should advances exceed the amount of cash required for a 30-day period. Advanced funds not disbursed in a timely manner must be promptly returned to DoC. If a recipient demonstrates an unwillingness or inability to establish procedures which will minimize the time elapsing between the transfer of funds and disbursement or if the recipient otherwise fails to continue to qualify for the advance method of payment, the Grants Officer may change the method of payment to reimbursement only.

.03 Federal and Non-Federal Sharing

a. Awards which include Federal and non-Federal sharing incorporate a budget consisting of shared allowable costs. If actual allowable costs are less than the total approved budget, the Federal and non-

Federal cost shares shall be calculated by applying the approved Federal and non-Federal cost share ratios to actual allowable costs. If actual allowable costs are greater than the total approved budget, the Federal share shall not exceed the total Federal dollar amount authorized by the award.

b. The non-Federal share, whether in cash or in-kind, is expected to be paid out at the same general rate as the Federal share. Exceptions to this requirement may be granted by the Grants Officer based on sufficient documentation demonstrating previously determined plans for, or later commitment of, cash or in-kind contributions. In any case, the recipient must meet its cost share commitment over the life of the award.

.04 Budget Changes and Transfer of Funds Among Categories

a. Requests for budget changes to the approved estimated budget in accordance with the provision noted below must be submitted to the Grants Officer who shall make the final determination on such requests and notify the recipient in writing.

b. Transfers of funds by the recipient among direct cost categories are permitted for awards in which the Federal share of the project is $100,000 or less. For awards in which the Federal share of the project exceeds $100,000, transfers of funds must be approved in writing by the Grants Officer when the cumulative amount of such transfers exceed 10 percent of the current total Federal and non-Federal funds authorized by the Grants Officer. The 10 percent threshold applies to the total Federal and non-Federal funds authorized by the Grants Officer at the time of the transfer request. This is the accumulated amount of Federal funding obligated to date by the Grants Officer along with any non-Federal share. The same criteria applies to the cumulative amount of transfer of funds among programs, functions, and activities. Transfers will not be permitted if such transfers would cause any Federal appropriation, or part thereof, to be used for purposes other than those intended. This transfer authority does not authorize the recipient to create new budget categories within an approved budget unless the Grants Officer has provided prior approval.

c. The recipient is not authorized at any time to transfer amounts budgeted for direct costs to the indirect costs line item or vice versa, without written prior approval of the Grants Officer.

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This award is subject to the laws and regulations of the United States. Any inconsistency or conflict in terms and conditions specified in the award will be resolved according to the following order of precedence: public laws, regulations, applicable notices published in the Federal Register, EOs, OMB circulars, Department of Commerce (DOC) Financial Assistance Standard Terms and Conditions, agency standard award conditions (if any), and special award conditions. Special award conditions may amend or take precedence over DOC standard terms and conditions, on a case-by-case basis, when allowed by the DOC standard term and condition.

Some of the DOC terms and conditions herein contain, by reference or substance, a summary of the pertinent statutes, or regulations published in the Federal Register or Code of Federal Regulations (CFR), EOs, OMB circulars or the assurances (Forms SF-424B, 424D). To the extent that it is a summary, such provision is not in derogation of, or an amendment to, any such statute, regulation, EO, or OMB circular.

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b. The reports must be submitted to the Grants Officer in hard copy (no more than an original and two copies), or electronically when specified in the special award conditions.

.02 Award Payments

a. The advance method of payment shall be authorized unless otherwise specified in a special award condition. The Grants Officer determines the appropriate method of payment. Payments will be made through electronic funds transfers directly to the

recipient's bank account and in accordance with the requirements of the Debt Collection Improvement Act of 1996 and the Cash Management Improvement Act. The DOC Award Number must be included on all payment-related correspondence, information, and forms.

b. When the "Request for Advance or Reimbursement" (SF-270) is used to request payment, the recipient shall submit the request no more frequently than monthly, and advances shall be approved for periods to cover only expenses anticipated over the next 30 days. When the SF-270 is used, the recipient must complete the SF-3881, "ACH Vendor Miscellaneous Payment Enrollment Form," and return it to the Grants Officer.

c. Unless otherwise provided for in the award terms, payments under this award will be made using the Department of Treasury's Automated Standard Application for Payment (ASAP) system. Under the ASAP system, payments are made through preauthorized electronic funds transfers, in accordance with the requirements of the Debt Collection Improvement Act of 1996. In order to receive payments under ASAP, recipients are required to enroll with the Department of Treasury, Financial Management Service, Regional Financial Centers, which allows them to use the on-line and Voice Response System (VRS) method of withdrawing funds from their ASAP established accounts. The following information will be required to make withdrawals under ASAP: (1) ASAP account number – the award number found on the cover sheet of the award; (2) Agency Location Code (ALC); and Region Code. Recipients enrolled in the ASAP system do not need to submit a "Request for Advance or Reimbursement" (SF-270), for payments relating to their award. Awards paid under the ASAP system will contain a special award condition, clause, or provision describing enrollment requirements and any controls or withdrawal limits set in the ASAP system.

d. Advances shall be limited to the minimum amounts necessary to meet immediate disbursement needs, but in no case should advances exceed the amount of cash required for a 30-day period. Advanced funds not disbursed in a timely manner and any applicable interest must be promptly returned to DOC. If a recipient demonstrates an unwillingness or inability to establish procedures which will minimize the time elapsing between the transfer of funds and disbursement or if the recipient otherwise fails to continue to qualify for the advance method of payment, the Grants Officer may change the method of payment to reimbursement only.

.03 Federal and Non-Federal Sharing

a. Awards which include Federal and non-Federal sharing incorporate a budget consisting of shared allowable costs. If actual allowable costs are less than the total approved budget, the Federal and non-Federal cost shares shall be calculated by applying the approved Federal and non-Federal cost share ratios to actual allowable costs. If actual allowable costs are greater than the total approved budget, the Federal

share shall not exceed the total Federal dollar amount authorized by the award.

b. The non-Federal share, whether in cash or in-kind, is expected to be paid out at the same general rate as the Federal share. Exceptions to this requirement may be granted by the Grants Officer based on sufficient documentation demonstrating previously determined plans for, or later commitment of, cash or in-kind contributions. In any case, the recipient must meet its cost share commitment over the life of the award.

.04 Budget Changes and Transfer of Funds Among Categories

a. Requests for budget changes to the approved estimated budget in accordance with the provision noted below must be submitted to the Grants Officer who shall make the final determination on such requests and notify the recipient in writing.

b. Transfers of funds by the recipient among direct cost categories are permitted for awards in which the Federal share of the project is $100,000 or less. For awards in which the Federal share of the project exceeds $100,000, transfers of funds among direct cost categories must be approved in writing by the Grants Officer when the cumulative amount of such direct cost transfers exceed 10 percent of the total Federal and non-Federal funds authorized by the Grants Officer. The 10 percent threshold applies to the total Federal and non-Federal funds authorized by the Grants Officer at the time of the transfer request. This is the accumulated amount of Federal funding obligated to date by the Grants Officer along with any non-Federal share. The same criteria apply to the cumulative amount of transfer of funds among programs, functions, and activities. Transfers will not be permitted if such transfers would cause any Federal appropriation, or part thereof, to be used for purposes other than those intended. This transfer authority does not authorize the recipient to create new budget categories within an approved budget unless the Grants Officer has provided prior approval. In addition, this does not prohibit the recipient from requesting Grants Officer approval for revisions to the budget.

c. The recipient is not authorized at any time to transfer amounts budgeted for direct costs to the indirect costs line item or vice versa, without written prior approval of the Grants Officer.

.05 Indirect Costs

a. Indirect costs will not be allowable charges against the award unless specifically included as a cost item in the approved budget incorporated into the award. (The term “indirect cost” has been replaced with the term “facilities and administrative costs” under OMB Circular A-21, “Cost Principles for Educational Institutions.”)

b. Excess indirect costs may not be used to offset unallowable direct costs.

Data elements will include:

Name of entity receiving award;

Award amount;

Transaction type, funding agency, Catalog of Federal Domestic Assistance Number, and descriptive award title;

Location of: entity, primary location of performance (City/State/Congressional District/Country; and

Unique identifier of entity.

The data will be required within 30 days of an award. The DOC will be implementing this Act, which will require recipients and subrecipients to report the required data.

GENERAL TERMS AND CONDITIONS ADVANCED TECHNOLOGY PROGRAM Aug 2001

GENERAL TERMS AND CONDITIONS

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Attachment A – Optional Guidelines for Quarterly R&D Performance Reports (5 Pages)

Attachment B – Guidelines for Reporting on Business Progress and Economic Impacts (2 Pages)

GOVERNMENT EXHIBIT 2 07 Cr. 541 (RPP) (ID)

GENERAL TERMS AND CONDITIONS ADVANCED TECHNOLOGY PROGRAM (ATP)

August 2001

This document applies to all Recipients of the ATP Cooperative Agreements. ATP Recipient is defined to include all single company Recipients and each individual company that is identified in the Special Award Conditions as a Joint Venture participant.

1. ORDER OF PRECEDENCE OF TERMS AND CONDITIONS OF AWARD

Where the terms of the award and proposal differ, the terms of the award shall prevail. The Recipient is obligated to bring to the attention of the Grants Specialist any perceived difference between any terms and conditions and the proposal.

2. REFERENCED REQUIREMENTS

The ATP Statute, 15 U.S.C. Sec. 278n; the ATP Rule, 15 CFR Part 295; the ATP Notice of Availability of Funds, 66 Fed. Reg. 96 (January 2001); and the ATP Proposal Preparation Kit (November 2000) are hereby incorporated into the award by reference.

3. AUTHORITY TO MODIFY

The Grants Officer is the ONLY authorized agent at NIST with the authority to bind the Federal Government, and to take actions to amend, suspend, and terminate the cooperative agreement.

4. REQUIREMENTS FOR CONTINUING FINANCIAL ASSISTANCE

a. With respect to any technology arising from assistance provided by NIST under this award, the Recipient shall promote the manufacture of products resulting from that technology within the United States and shall procure parts and materials from competitive United States suppliers to the extent practical.

b. At any time within the life of this award should the Recipient cease to have a majority control or ownership by individuals who are citizens of the United States, the ***Recipient shall notify the NIST Grants Officer of that fact, in writing, within FIFTEEN (15) days.***

c. In accordance with 15 U.S.C. 278n Sec. (d) (9) and (e), NIST may, within thirty (30) days after notice to Congress, suspend a company from continued assistance under this award if NIST determines that the company or a parent company has failed to satisfy any of the criteria contained in paragraphs a. and b. of this term, and that it is in the national interest of the United States to do so.

5. NIST PROJECT MANAGEMENT TEAM

The NIST Project Management Team (PMT) includes an ATP Project Manager, a NIST Grants Specialist, and one or more ATP technical and business specialists. The ATP Project Manager is responsible for working with the Recipient, including making recommendations to the NIST Grants Officer throughout the life of the project to ensure that the project progresses towards the objectives stated in the proposal in an optimal way. The ATP Project Manager (and other members of the PMT as appropriate) shall participate in a project start or kickoff meeting, annual reviews, and a close-out meeting prior to the expiration of the award. The ATP Project Manager is responsible for the following:

a. General oversight and project management functions associated with this cooperative agreement.

b. Arranging kickoff meetings, annual review meetings, and final closeout meetings.

c. Monitoring the project to ensure that it is executed in accordance with the proposal and this award; this includes analyzing the quarterly, annual, and final reports, and consulting with other members of the PMT to assess progress.

d. Recommending appropriate action to the NIST Grants Officer if the project is failing to meet its objectives.

6. SUBSTANTIAL INVOLVEMENT

NIST has selected a cooperative agreement as the funding instrument for this project. Accordingly, the NIST Project Management Team will be substantially involved in the following areas:

a. Approval of go/no go decision points at various project stages before subsequent stages of a project may continue, if specified in the Special Award Conditions;

b. Concurrence with sole source procurements in excess of $100,000;

c. Approval of key personnel specified in the proposal (including such positions as Financial Officer, Administrator, Principal Investigator, and/or Project Manager); and

d. Approval of changes in Joint Venture membership.

7. TECHNICAL/BUSINESS/FINANCIAL REPORTS AND PLANS

The Recipient shall provide access to information that is required to assess the project's progress throughout the project life cycle. In addition to monitoring the technical work, NIST requires business information pertaining to the project during the life of the project and for six years after its end to assess progress towards commercialization, the degree of adoption of the technology, and the impact of the project on the economy.

a. Technical Reporting:

The Recipient shall submit technical performance reports in triplicate (one original and two copies). Two copies shall be submitted to the ATP Project Manager and the original report to the Grants Officer in the same frequency as the Financial Status Report (SF-269). Technical performance reports shall contain information as prescribed in 15 CFR 14.51. (See Attachment A for an optional structure or format for the technical report.)

b. Business Reporting:

The Recipient shall submit business reports in accordance with the "Guidelines for Reporting on Business Progress and Economic Impacts" (see Attachment B).

c. Financial Reporting:

(1) Actual or Incurred Costs

By signing this award the Recipient agrees to ensure that only actual costs incurred will be charged to the award and that all costs will be reasonable, allocable, and allowable in accordance with the applicable Federal Cost Principles. See 15 CFR 14.27. The Recipient shall also ensure that all salaries/wages (technical and administrative), fringe benefits, travel, materials and supplies, equipment, subcontracts, other costs, and indirect costs proposed and to be incurred under this award are consistent with costs incurred for like or similar items on all other Federal and non-Federal projects or cost centers (exclusive of any profits or fees) of the Recipient (including its Joint Venture Partners when applicable).

(2) Cost Share

The Joint Venture (JV) Administrator is responsible for conducting a review of the financial status reports for each JV participant to ensure that the financial information is consistent with each participant's approved budget and consistent with Chapter 5, Examination Procedures, item 4. of the NIST Program-Specific Audit Guidelines for Advanced Technology Program Cooperative Agreements with Joint Ventures, dated September 1999. Any discrepancies must be resolved by the JV Administrator prior to submitting financial reports or requesting payments from NIST. The JV Administrator must ensure that the overall award cost-share requirements are met throughout the award. In addition, each JV member is responsible for meeting its cost share in accordance with its approved budget throughout the award.

(3) Submission of Financial Reports

For ATP Recipients, Article A.01 of the DoC Financial Assistance Standard Terms and Conditions dated October 1998 is revised as follows:

(a) The Recipient shall submit a "Financial Status Report" (SF-269) on a calendar quarter basis for the periods ending March 31, June 30, September 30, and December 31, or any portion thereof, unless otherwise specified in a special award condition. Reports are due no later than 30 days following the end of each reporting period. A final SF-269 shall be submitted within 90 days after the expiration date of the award.

(b) The Recipient shall submit a "Federal Cash Transactions Report" (SF-272) for each award where funds are advanced to Recipients. The SF-272 is due 15 working days following the end of each calendar quarter for awards under $1 million dollars; or 15 working days following the end of each month for awards over $1 million dollars; or unless otherwise specified in a special award condition.

(c) All financial reports shall be submitted in triplicate (one original and two copies) to the NIST Grants Office.

8. KICK-OFF MEETINGS, ANNUAL REVIEWS, CLOSEOUT MEETINGS, AND SPECIAL STUDIES

The Recipient and each Joint Venture participant, if applicable, shall participate in kick-off, annual review, and closeout meetings. The ATP Project manager will provide the Recipient with meeting instructions in advance of these meetings.

Consistent with the requirements of the Government Performance and Results Act of 1993, Recipients may be asked from time to time to participate in special economic studies or case studies. All requests for participation in such studies will be in accordance with the Paperwork Reduction Act (PRA) requirements as implemented by 5 CFR 1320, and will display a PRA approval number.

9. PRIOR APPROVAL REQUIREMENTS

The prior approval requirements in 15 CFR 14.25, paragraph (e) MAY NOT be waived automatically by the Recipient and require written approval from the Grants Officer.

In addition to the requirements specified in 15 CFR 14.25, Recipients shall obtain prior written approval from the NIST Grants Officer for the following changes:

a. The transfer of funds among direct cost categories must be approved in advance by the Grants Officer if the transfer exceeds 10% of the approved total annual budget for each single Recipient or Joint Venture participant for each approved project year. Recipients are not authorized to create new budget categories without prior approval. The Recipients are not authorized at any time to transfer amounts budgeted for direct costs to the indirect cost line item

b. Revisions to Ownership and/or Dissolution of Recipient (Recipient includes the single company or any Joint Venture participant)must be approved in advance by the Grants Officer. These changes include but are not limited to the following:

(1) In the event that a company is acquired by, or merges with, any other company, including a foreign company, the Recipient shall include in the written notification to the NIST Grants Officer the following information: date of final acquisition or merger; name and address of any new foreign parent and amount of ownership; whether the Recipient intends to complete its assigned tasks with the same commitment and at the same location; and how this change in ownership will affect the project's projected benefits to the United States. The NIST Grants Officer reserves the right to ask for clarification and/or additional information.

(2) When the company is no longer majority-owned by U.S. citizens, the Recipient should provide details of the change in ownership and a discussion of whether the change affects the Recipient's assigned tasks in any way.

(3) When only two for profit companies are participating in a Joint Venture and one of them ceases participation, the Recipient shall provide details regarding the circumstances of the departure, and plans for replacing the departing company with another for-profit organization.

c. Any substitution, addition, or withdrawal of participants to a joint venture must be approved in advance by the Grants Officer. In the event there is a proposed change to the Joint Venture, all newly-proposed Joint Venture participants shall submit the following documents through the Joint Venture Administrator to the Grants Officer for review and approval: CD-511, SF-424B, NIST-1263, CD-346, SF-LLL. New participants must also satisfy the requirements of Article A.05.c of the Department of Commerce (DoC) Financial Assistance Standard Terms and Conditions. The Joint Venture Administrator must provide to the NIST Grants Officer a revised Joint Venture Agreement and documentation of the Recipient's notification to the Department of Justice and the Federal Trade Commission of the changes, additions and/or deletion of participants.

10. UNALLOWABLE PROJECT COSTS

Those costs that are designated as being unallowable in Chapter 1, Sections C.4 and C.5 of the November 2000 ATP Proposal Preparation Kit will be unallowable under this award.

11. PROGRAM INCOME

a. Program income earned during the project period shall be retained by the recipient and shall be used to finance any non-Federal share of the project.

b. Recipients shall have no obligation to the Federal Government regarding program income earned after the end of the project period.

c. Costs incidental to the generation of program income may be deducted from gross income to determine program income, provided these costs have not been charged to the award

d. Proceeds from the sale of property shall be handled in accordance with the requirements of Property Standards in 15 CFR 14.30 through 14.37.

e. Recipients shall have no obligation to the Federal Government with respect to program income earned from license fees and royalties for copyrighted material, patents, patent applications, trademarks, and inventions produced under an award.

12. EQUIPMENT

Upon expiration of the project period, the Recipient shall submit to the NIST Grants Officer an inventory of equipment acquired with Federal funds, as prescribed in 15 CFR 14.34, along with an "Equipment Disposition Certification." The

certification provides the Recipient an opportunity to request authorization to continue to utilize the equipment for the purposes of the commercialization initiative. If approved by the NIST Grants Officer, the Recipient shall report to NIST every two years the condition of the equipment as long as the current market value is more than $5,000.

For Joint Venture awards, title to any equipment purchased under the award, including intangible property that meets the definition of equipment in 15 CFR 14.2(n), that may be in the name of a departing participant, and that is vital to the project, **shall be transferred to another Joint Venture participant as instructed by the Joint Venture Administrator for continued use on the project.** The Joint Venture shall make compensation to the departing participant for its contribution to the purchase of the equipment by applying its percentage of the cost of the equipment to the current fair market value of the equipment. Should the equipment no longer be needed on the project, the departing participant shall request disposition instructions in accordance with 15 CFR 14.34.

13. NON-COMPLIANCE WITH STATUTORY PURPOSE

If NIST determines that the statutory purposes of research and development under 15 USC 278n can no longer be served (e.g., the project is no longer high-risk), the Recipient shall be deemed in material non-compliance with award requirements. As a result, NIST may terminate the award pursuant to 15 CFR 14.61.

14. REFUNDS

The Recipient shall promptly submit all refund checks (including interest earned on advances) to the DoC accounting office identified below and notify the Grants Office upon submission. Each check must identify on its face the NIST award number, and no more than a two-word description to identify the reason for the refund. Submit to:

National Institute of Standards and Technology
Accounts Receivable
100 Bureau Drive, Stop 3751
Bldg. 101, Room A820
Gaithersburg, MD 20899-3751

15. AUDITS

Project audits (of Federal and non-Federal funds) are required for all ATP Recipients except when those Recipients are required to comply with the Single Audit Act of 1996 and the audit requirements of Office of Management and Budget (OMB) Circular A-133, "Audits of States, Local Governments and Non-Profit Organizations." Subcontractors/subawardees, including universities, who receive total funding under an ATP project totaling more than **$300,000** each are also subject to the audit requirement. A subcontractor/subawardee is defined as an organization which receives a portion of the financial assistance from the recipient/awardee and assists the ATP recipient/awardee in meeting the project goals, but does not include the procurement of goods and services.

a. ALL ATP Recipients, including each Joint Venture participant (if a Joint Venture project), are required to provide sufficient funds as direct costs (unless included as indirect) in the project's multi-year budget to have project audits performed according to the Schedule shown in b. below.

b. All Recipients shall schedule audits as follows:

   (1) For awards less than 24 months, an audit is required within 90 days from the project expiration date.

   (2) For 2-, 3-, or 4-year awards, an audit is required within 90 days after the end of the first year and within 90 days from the project expiration date.

   (3) For 5-year awards, an audit is required within 90 days after the end of the first year and third year, and within 90 days from the project expiration date.

c. Audits of all Recipients shall be conducted in accordance with *Government Auditing Standards (GAS)*, issued by the Comptroller General of the United States (the Yellow Book). If an ATP Recipient is required to have an audit performed in accordance with OMB Circular A-133, "Audits of States, Local Government, and Non-Profit Organizations", the annual OMB Circular A-133 audit is deemed to meet the ATP audit requirement. If an ATP Recipient does not have an annual OMB Circular A-133 audit performed, the Recipient should follow the following project audit requirements:

   (1) Audits for single company Recipients shall be conducted using the *NIST Program-Specific Audit Guidelines for Advanced Technology Program (ATP) Cooperative Agreements with Single Companies.*

   (2) Audits for joint venture Recipients shall be conducted using the *NIST Program-Specific Audit Guidelines for Advanced Technology Program (ATP) Cooperative Agreements with Joint Ventures.*

The program specific guidelines may be useful in identifying the allowability of specific cost elements and other programmatic compliance requirements for those recipients required to have an OMB Circular A-133 audit.

d. The Recipient shall submit **two (2) copies** of each audit report, one to the address shown in Article D.01.c. of the DoC Financial Assistance Standard Terms and Conditions dated October 1998, and one copy to the

NIST Grants Officer.

16. CLOSEOUT OF COOPERATIVE AGREEMENT

a. In accordance with the guidelines established in 15 CFR 14.71 and the DoC Financial Assistance Standard Terms and Conditions dated October 1998, article number A.06, the Grants Officer will allow only those costs associated with compiling the final reports (technical, business, financial, patent/invention, equipment inventory, and closeout audit), during the ninety (90) day closeout period.

b. The final technical progress (closeout) meeting with the ATP is not considered a closeout-related activity. Therefore, the closeout (end-of-project) meeting with NIST officials must be conducted **prior to the expiration date of the award.** The Recipient must provide adequate funds in the project budget to ensure participation by all appropriate members in the closeout meeting.

17. USE OF NAME OR ENDORSEMENTS

a. The Recipient and/or its subrecipients or subcontractors shall not, without the prior approval of NIST, use the name of NIST or the Department of Commerce on any product or service which is directly or indirectly related to either this award or any patent license or assignment agreement which relates to this award.

b. By entering into this award, NIST does not directly or indirectly endorse any product or service provided or to be provided by the Recipient, its successors, assignees, or licensees. The Recipient and its subrecipients and subcontractors, shall not in any way imply that this award is an endorsement of any such product or service.

18. PUBLICATION GUIDELINES

In any publications, the Recipient shall acknowledge support of the technology development by NIST. Normally this is done by a footnote reading, "This work was performed under the support of the U.S. Department of Commerce, National Institute of Standards and Technology, Advanced Technology Program, Cooperative Agreement Number 70NANBXHXXXX," or words to that effect.

19. PROTECTION OF HUMAN SUBJECTS

Research involving human subjects is not permitted under this award unless expressly authorized by a Special Award Condition or otherwise in writing by the NIST Grants Officer.

The Federal Policy for the Protection of Human Subjects (The Common Rule), codified by the Department of Commerce at 15 CFR Part 27, requires Recipients to maintain appropriate policies and procedures for the protection of human subjects in research. The Common Rule defines a "human subject" as a living individual about whom an investigator conducting research obtains 1) data through intervention or interaction with the individual, or 2) identifiable private information. The term "research" means a systematic investigation, including research development, testing and evaluation, designed to develop or contribute to generalizable knowledge. The Common Rule also sets forth the categories of research that may be considered exempt from this policy.

In the event it becomes evident that a human subject may be involved in this project, the Recipient shall submit appropriate documentation to the ATP Project Manager for NIST institutional review and approval. This documentation may include the following:

(1) Documentation establishing review and approval of the project by a qualified Institutional Review Board (IRB). [NOTE: Recipients must provide documentation of continuing IRB approval by the cognizant IRB at appropriate intervals as designated by the IRB, but not less than annually];

(2) Documentation to support an exemption for the project from The Common Rule [NOTE: This option is not available for activities that fall under 45 CFR Part 46 Subpart B or C];

(3) Documentation to support a request for a deferral of review for research involving human subjects beginning after year 1 of the project [NOTE: This option is not available for activities that involve the use of human subjects as defined under 45 CFR 46 subpart B, which must be approved before an award can be made]

(4) Documentation of IRB approval of any modification to an IRB-approved existing protocol or informed consent form must be submitted to the ATP Project Manager for NIST Institutional review and approval.

No work involving human subjects may be undertaken, conducted, or costs incurred and/or charged to the project, until the NIST Grants Officer approves the required appropriate documentation in writing.

20. CARE AND USE OF LIVE VERTEBRATE ANIMALS

Research involving live vertebrate animals is not permitted under this award unless expressly authorized by a Special Award Condition or otherwise in writing by the NIST Grants Officer.

The Department of Commerce requires Recipients of financial assistance awards to comply, as applicable, with the Animal Welfare Act as amended, and implementing regulations found at 7 USC 2131-2157, 9 CFR parts 1, 2, and 3.

In the event it becomes evident that live vertebrate animals may be involved in this project, the Recipient shall submit appropriate documentation to the ATP Project Manager for NIST institutional review and approval. This documentation may include the following:

(1) Documentation of the Recipient's United States Department of Agriculture (USDA) Animal Welfare Act certification, or Animal Welfare assurance from the Office of Laboratory Animal Welfare (OLAW) of the Public Health Service/National Institutes of Health (PHS/NIH), or if only using rodents, birds or fish, and the above USDA or OLAW documents have not been attained, evidence of full accreditation from the Association for the Assessment and Accreditation of Laboratory Animal Care (AAALAC);

(2) A copy of the Institutional Animal Care and Use Committee (IACUC)-approved Animal Study Protocol (ASP) that includes all signature(s) as required by the organizational IACUC. The Recipient shall provide documentation, in the ASP or a separate certification approved by the IACUC, that the Principal Investigator and other personnel involved in the care and use of the animals are trained and experienced in the procedures to be used in the Protocol in accordance with the National Research Council " Guide for the Care and Use of Laboratory Animals" (NRC Guide);

(3) A copy of the IACUC approval letter for the approved ASP. [NOTE: Documentation of continuing IACUC review by the cognizant IACUC must be submitted to the ATP Project Manager as it occurs];

(4) Documentation of IACUC approval of any modification to an IACUC-approved existing protocol must be submitted to the ATP Project Manager for NIST Institutional review and approval.

No work involving live vertebrate animals may be undertaken, conducted, and/or costs incurred and/or charged to the project, until the NIST Grants Officer approves the required appropriate documentation in writing.

21. BUREAU OF EXPORT ADMINISTRATION (BXA) CLEARANCE

a. The Recipient agrees to adhere to the U.S. Export Administration laws and regulations and shall not export or re-export, directly or indirectly, any technical data created with Government funding under this award to any country for which the United States Government or any agency thereof, at the time of such export or re-export, requires an export license or other Governmental approval without first obtaining such licenses or approval and the written clearance of the NIST Grants Officer.

b. The Bureau of Export Administration (BXA) shall conduct an annual review for any relevant information about the Recipient's compliance with U.S. export laws. NIST reserves the right to take appropriate action in accordance with 15 CFR 14.62 and Article L.01 of the Department of Commerce Financial Assistance Standard Terms and Conditions, if the BXA reports significant adverse information about the Recipient to the NIST Grants Officer.

22. NORTH AMERICAN FREE TRADE AGREEMENT PATENT NOTIFICATION PROCEDURES

Pursuant to Executive Order 12889, the DoC is required to notify the owner of any valid patent covering technology whenever the DoC or its financial assistance Recipient, without making a patent search, knows (or has demonstrable reasonable grounds to know) that technology covered by a valid United States patent has been or will be used without a license from the owner. To ensure proper notification, if the Recipient uses or has used patented technology under this award without a license or permission from the owner, the Recipient must notify the DoC Patent Counsel at the following address, with a copy to the NIST Grants Officer:

Department of Commerce
Office of Chief Counsel for Technology
Patent Counsel
14th Street and Constitution Avenue, NW
Room H-4610
Washington, DC 20230

The notification shall include the following information:

a. The award number
b. The name of the DoC awarding agency
c. A copy of the patent
d. A description of how the patented technology was used
e. The name of the Recipient contact, including an address and telephone number

23. LIABILITY

a. Property

The U.S. Government shall not be responsible for damage to or resulting from any property provided to the Recipient,

and/or its subrecipients and/or subcontractors, and/or acquired by the Recipient, and/or its subrecipients and/or subcontractors, pursuant to this award.

b. No Warranty

NIST makes no express or implied warranty as to any matter whatsoever, including the conditions of the research or any invention or product, whether tangible or intangible, made, or developed under this award, or the ownership, merchantability, or fitness for a particular purpose of the research or any invention or product made or developed under this award.

c. Disclaimer

(1) The United States expressly disclaims any and all responsibility to the Recipients or third persons for the actions of the Recipient or third persons resulting in death, bodily injury, property damage, or any other losses resulting in any way from the performance of this award or any subaward or subcontract under this award.

(2) The acceptance of this award by the Recipient does not in any way constitute an agency relationship between the United States and the Recipient.

d. Indemnification

(1) The Recipient, and/or its subrecipients and/or subcontractors, agree to indemnify and hold harmless the U.S. Government for all liabilities, demands, damages, expenses and losses arising out of the use by the Recipient, its subrecipients, subcontractors, and/or any party acting on their behalf or under their authorization, of products made by the use of technical developments arising under this agreement. This provision shall survive termination of this award.

(2) The Recipient, and/or its subrecipients and/or subcontractors, agree to indemnify and hold harmless the U.S. Government for any loss, claim, damage, or liability of any kind involving the Recipient's, subrecipient's, and/or subcontractor's employees arising in connection with this award.

e. Force Majeure

Neither party shall be liable for any unforeseeable event beyond its reasonable control not caused by the fault or negligence of such party, which causes such party to be unable to perform its obligations under this award (and which it has been unable to overcome by the exercise of due diligence), including, but not limited to: flood, drought, earthquake, storm, fire, pestilence, lightning and other natural catastrophes, epidemic, war, riot, civil disturbance or disobedience, strikes, labor dispute, or failure, threat of failure, or sabotage of the Recipient or subcontractor facilities, or any order or injunction made by a court or public agency. In the event of the occurrence of such a *force majeure* event, the party unable to perform shall promptly notify the other party. It shall further use its best efforts to resume performance as quickly as possible and shall suspend performance only for such period of time as is necessary as a result of the *force majeure* event.

24. INFORMAL COLLABORATORS

All informal collaborators in ATP awards are subject to ATP intellectual property regulations as specified in 15 CFR 295.8. Informal collaborator means any individual or organization which consults, cooperates with, or participates in the performance of this award, and is not included in the approved award budget.

25. INTELLECTUAL PROPERTY

a. Rights in Data

(1) The Government shall have certain rights to use data first produced in the performance of the award, whether or not the data is copyrighted. The Recipient may establish claim to copyright subsisting in any data first produced in the performance of the award. When claim is made to copyright, the Recipient shall affix the applicable copyright notice of 17 U.S.C. Sec. 401 or 402 and acknowledgment of Government sponsorship to the data when and if the data are delivered to the Government, are published, or are deposited for registration as a published work in the U.S. Copyright Office. The Recipient shall grant to the Government, and others acting on its behalf, a paid up, nonexclusive, irrevocable, worldwide license for all such data to reproduce, prepare derivative works, perform and display publicly, and for data other than computer software to distribute to the public by or on behalf of the Government.

(2) The licenses granted to the Government under this Term shall not be considered as a waiver of the nondisclosure requirements of 15 U.S.C. Section 278n(d)6: "Intellectual property owned or developed by any business receiving funding may not be disclosed by any officer or employee of the Federal Government except in accordance with a written agreement between the owner or developer and the Program."

b. Patent Rights

(1) Definitions

(a) "Company" means a for-profit organization, including sole proprietors, partnerships, or corporations.

(b) "Invention" means any invention or discovery which is or may be patentable or otherwise protectable under Title 35 of the United States Code.

(c) "Made" means, when used in relation to any Invention, the conception or first actual reduction to practice of such invention.

(d) "Practical Application" means to manufacture in the case of a composition or product, to practice in the case of a process or method, or to operate in the case of a machine or system; and in each case, under such conditions as to establish that the invention is being utilized and that its benefits are, to the extent permitted by law or government regulations, available to the public on reasonable terms.

(e) "Subject Invention" means any invention of the Recipient conceived or first actually reduced to practice in the performance of work under this award.

(2) Ownership of Inventions

Pursuant to the statute that establishes the ATP (15 U.S.C. 278n(d)(11)), this paragraph takes precedence over 15 CFR 14.36 and DoC Financial Assistance Standard Terms and Conditions, dated October 1998, article C.02. The Recipient or, if appropriate, its subrecipients, contractor(s) and/or subcontractor(s), shall have the entire right, title, and interest throughout the world to each Subject Invention according to the provisions of this clause, provided that this party is a company or companies organized in the United States. Joint ventures shall provide to NIST a copy of their written agreement which defines the disposition of ownership rights among the members of the joint venture, and their contractor and/or subcontractors, as appropriate, in accordance with the second sentence of this paragraph. **However, the United States hereby reserves a nonexclusive, nontransferable, irrevocable paid-up license to have practiced for, or on behalf of, the United States, any such invention.** Title to any such invention shall not be transferred or passed, except to a company organized in the United States, until the expiration of the first patent obtained in connection with such invention.

(3) Invention Disclosure, United States License and Filing of Patent Application by Recipient

(a) The Recipient shall disclose each subject invention to NIST within **two months after the inventor** discloses it in writing to Recipient personnel responsible for patent matters. The disclosure to NIST shall be in the form of a written report and shall identify the award under which the invention was made and the inventor(s). It shall, at a minimum, contain the following information:

- the title of the invention;
- the names of all inventors;
- the name and address of the assignee (if any);
- an acknowledgement that the United States has rights in the subject invention (i.e., the Governmental Use License);
- the filing date of the present invention;
- an abstract of the disclosure;
- a description or summary of the present invention;
- the background of the present invention or the prior art;
- a description of the preferred embodiments
- what matter is claimed

One original and two copies of all patent reports shall be submitted to:

NIST
Grants and Agreements Management Division
100 Bureau Drive, MAIL STOP 3580
Building 411, Room A143
Marked FOR: Agreement Number _____
Gaithersburg, MD 20899-3580

Each report shall also include the use of the invention and whether a manuscript describing the invention has been submitted for publication and, if so, whether it has been accepted for publication at the time of disclosure. In addition, after disclosure to NIST, the Recipient will promptly notify NIST of acceptance of any manuscript describing the invention for publication or of any sale or public use planned by the Recipient.

(b) The Recipient shall notify NIST **within two years** of disclosure to NIST whether or not the Recipient intends to file a patent application on any subject invention.

If a patent is issued, the Recipient(s) must submit the following to the Grants Office:

- The award number under which the invention was made;
- The serial number of the patent issued;
- The date of issuance;
- A copy of the disclosure as issued (including the drawings) and;

- The name(s), address, and telephone number(s) of an assignee.

In a JV award, the administrator must submit the patent information to NIST for all participants. In order to prevent disclosure of information to the general public under the Freedom of Information Act (FOIA) or any other statute, each page of each patent report should be marked, "CONFIDENTIAL/PROPRIETARY."

(c) Requests for extension of the time for disclosure, election, and filing under paragraphs 24.b.(3)(a) and (b) of this Term may be permitted at the discretion of NIST.

(4) Recipient Action to Protect the Government's Interest

(a) The Recipient agrees to execute or to have executed and promptly deliver to NIST all instruments necessary to establish or confirm the rights the United States Government has throughout the world in those subject inventions to which the Recipient has filed a patent application in which the United States has reserved a non-exclusive license.

(b) The Recipient shall require, by written agreement, its employees, other than clerical and nontechnical employees, to disclose promptly in writing to personnel identified as responsible for the administration of patent matters and in a format suggested by the Recipient, each subject invention made under the award in order that the Recipient can comply with the disclosure provisions of paragraph b.3. of this Term, and to execute all papers necessary to file patent applications on subject inventions and to establish the Government's rights in the subject inventions. This disclosure format should require, as a minimum, the information required by b.3.(a) of this Term. The Recipient shall instruct such employees through employee agreements or other suitable education programs on the importance of reporting inventions in sufficient time to permit the filing of patent applications prior to United States or foreign statutory bars.

(c) The Recipient shall promptly notify NIST of any decisions not to continue the prosecution of a patent application, the payment of maintenance fees, or the defense in a reexamination or opposition proceeding on a patent in any country.

(d) The Recipient agrees to include, within the specification of any United States patent application and any patent issuing thereon covering a subject invention, the following statements:

This invention was made with United States Government support under (identify the cooperative agreement number) awarded by the National Institute of Standards and Technology (NIST).

The United States Government has certain rights in the invention.

(5) Subawards and Subcontracts

The Recipient shall include in all subawards and subcontracts, regardless of tier, for experimental, developmental, or research work, a patent rights clause, as appropriately modified, comparable to this term. However, pursuant to the statute establishing the ATP (15 U.S.C. 278n(d)(11)), if the subrecipient or subcontractor is not a company organized in the United States, the patent rights clause shall provide that title to each subject invention made by the subrecipient or subcontractor shall vest with a company or companies incorporated in the United States.

(6) Reporting on Utilization of Subject Inventions

The Recipient agrees to submit on request, no more frequently than annually, periodic reports on the utilization of a subject invention or on efforts at obtaining such utilization that are being made by the Recipient or its licensees or assignees. Such reports shall include information regarding the status of development, date of first commercial sale or use, gross royalties received by the Recipient, and such other data and information as NIST may reasonably specify. The Recipient also agrees to provide additional reports as may be requested by NIST in connection with any march-in proceeding undertaken by NIST in accordance with paragraph b.8. of this Term. Such information shall be treated by NIST as commercial and financial information and thus as privileged and confidential and not subject to disclosure under section 552 of Title 5 of the United States Code.

(7) Preference for United States Industry

Notwithstanding any other provision of this Term, the Recipient agrees that neither it nor any assignee will grant to any person the exclusive right to use or sell any subject inventions in the United States unless such person agrees that any products embodying the inventions will be manufactured substantially in the United States. However, in individual cases, the requirement for such an agreement may be waived by NIST upon a showing by the Recipient or its assignee that reasonable but unsuccessful efforts have been made to grant licenses on similar terms to potential licensees that would be likely to manufacture substantially in the United States or that, under the circumstances, domestic manufacture is not commercially feasible.

(8) March-in Rights

The Recipient agrees that, with respect to any subject invention in which it has acquired title, NIST has the right, in accordance with procedures in 37 CFR 401.6 and any supplemental regulations of NIST, to require the Recipient, an assignee, or an exclusive licensee of a subject invention to grant a nonexclusive, partially exclusive, or exclusive license in any field of use to a responsible applicant or applicants, upon terms that are reasonable under the circumstances. If the Recipient, assignee, or exclusive licensee refuses such a request, NIST has the right to grant such a license itself if NIST determines that:

(a) Such action is necessary because the Recipient or assignee has not taken, or is not expected to take within a reasonable time, effective steps to achieve practical application of the subject invention in such field of use;

(b) Such action is necessary to alleviate health or safety needs which are not reasonably satisfied by the Recipient, assignee, or licensees;

(c) Such action is necessary to meet requirements for public use specified by Federal regulations and such requirements are not reasonably satisfied by the Recipient, assignee, or licensees; or

(d) Such action is necessary because the agreement required by paragraph b.7. of this Term has not been obtained or waived or because a licensee of the exclusive right to use or sell any subject invention in the United States is in breach of the agreement required by paragraph b.7 of this Term.

GENERAL TERMS AND CONDITIONS
ADVANCED TECHNOLOGY PROGRAM
September 2007

GENERAL TERMS AND CONDITIONS

ATP

September 2007

General Terms and Conditions
Advanced Technology Program

September 2007

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Attachment A - Optional Guidelines for Quarterly R&D Performance Reports (4 Pages)
Attachment B - Guidelines for Reporting on Business Progress and Economic Impacts (2 Pages)

This document applies to <u>all Recipients</u> of the ATP Cooperative Agreements. ATP Recipient is defined to include all single company Recipients and each individual company or organization that is identified as a Joint Venture Partner in the Special Award Conditions.

General Terms and Conditions
Advanced Technology Program

September 2007

1. ORDER OF PRECEDENCE OF AWARD TERMS AND CONDITIONS

Where the terms of the award and proposal differ, the terms of the award shall prevail. The Recipient is obligated to bring to the attention of the Grants Specialist any perceived conflicts in the terms and conditions of the award.

2**. AUTHORITY TO MODIFY**

The NIST Grants Officer is the **ONLY** authorized agent at NIST with the authority to bind the Federal Government and to take actions to amend, suspend, and terminate the Award. In the case of a joint venture, the NIST Grants Officer may take enforcement action directly with an individual Joint Venture (JV) Partner, as warranted, as well as with the JV as a whole.

3. REQUIREMENTS FOR CONTINUING FINANCIAL ASSISTANCE

A. With respect to any technology arising from assistance provided by NIST under this award, the Recipient shall promote the manufacture of products resulting from that technology within the United States and shall procure parts and materials from competitive United States suppliers to the extent practical.

B. At any time within the life of this award should the Recipient cease to have a majority control or ownership by individuals who are citizens of the United States, the ***Recipient shall notify the NIST Grants Officer of that fact, in writing, within THIRTY (30) calendar days of such change in control or ownership.***

4. NIST PROJECT MANAGEMENT TEAM

The NIST Project Management Team (PMT) includes an ATP Project Manager, a NIST Grants Specialist, and one or more ATP technical and business specialists. The ATP Project Manager is responsible for:

A. General oversight and project management functions associated with the Award.

B. Arranging kickoff, annual review, and final closeout meetings.

C. Monitoring the project to ensure that it is executed in accordance with the proposal and this award; this includes analyzing the quarterly, annual, and final reports, and consulting with other members of the PMT to assess progress.

D. Recommending appropriate action to the NIST Grants Officer if the project is failing to meet its objectives.

5. SUBSTANTIAL INVOLVEMENT

NIST has selected a cooperative agreement as the funding instrument for this project. Consistent with Final Office of Management and Budget Guidance Implementing the Federal Grants and Cooperative Agreement Act, 43 Fed. Reg. 36860 (August 18, 1978), NIST will be substantially involved in the following areas:

A. Approval of go/no go decision points at various project stages before subsequent stages of a project may continue, if specified in the Special Award Conditions;

B. Concurrence with sole source procurements in excess of $100,000;

C. Approval of key personnel specified in the proposal (including such positions as, Principal Investigator); and

D. Approval of changes in Joint Venture membership.

6. TECHNICAL PERFORMANCE, BUSINESS, AND FINANCIAL REPORTS

The Recipient shall provide access to information that is required to assess the project's progress throughout the project life cycle. In addition to monitoring the technical work, NIST requires business information pertaining to the project during the life of the project and for six years after its end to assess progress towards commercialization, the degree of adoption of the technology, and the impact of the project on the economy.

A. Technical Reporting:

The Recipient shall submit technical performance reports in triplicate (one original and two copies). Two copies shall be submitted to the ATP Project Manager and the original report to the NIST Grants Officer in the same frequency as the SF-269 (Financial Status Report). Technical performance reports shall contain information as prescribed in 15 C.F.R §14.51. (See Attachment A for Optional Guidelines for Quarterly Technical Performance Reports.)

B. Business Reports:

The Recipient shall submit business reports in accordance with the "*Guidelines for Reporting on Business Progress and Economic Impacts*" (see Attachment B).

C. Financial Reports:

For submission of financial reports for ATP Recipients, Article A.01 of the *Department of Commerce (DoC) Financial Assistance Standard Terms and Conditions* dated May 2007 is revised as follows:

(1) The Recipient shall submit a SF-269 on a calendar quarter basis for the periods ending March 31, June 30, September 30, and December 31, or any portion thereof, unless otherwise specified in a Special Award Condition. Reports are due no later than Thirty (30) calendar days following the end of each reporting period. A final SF-269 shall be submitted within Ninety (90) calendar days after the expiration date of the award.

(2) All financial reports shall be submitted in triplicate (one original and two copies) to the Grants Specialist.

(3) By signing this award the Recipient agrees to ensure that only actual costs incurred will be charged to the award and that all costs will be reasonable, allocable, and allowable in accordance with the applicable Federal Cost Principles (see 15 C.F.R. §14.27). The Recipient shall also ensure that all salaries/wages (technical and administrative), fringe benefits, travel, materials and supplies, equipment, subcontracts, other costs, and indirect costs proposed and to be incurred under this award are consistent with costs incurred for like or similar items on all other Federal and non-Federal projects or cost centers (exclusive of any profits or fees) of the Recipient, including each JV Partner. All costs charged to the project are subject to audits.

(4) Where a Recipient's, including each JV Partner's normal accounting practice makes use of blended or average labor rates in lieu of actual salaries, the Recipient must provide the NIST Grants Officer with a copy of its current, Federally audited and approved pricing or rate agreement. The Recipient must, throughout the project period of the award, maintain contemporaneous records of the actual labor hours expended on the project, and ensure that the appropriate labor schedule and

category are used. Only actual incurred costs are allowed to be charged to the project and are subject to audits.

7. COST SHARE

A. Cost share commitments must be met and the non-Federal share, whether in cash or in-kind, is expected to be paid out at the same general rate as the Federal share, throughout the Award in accordance with the approved budget. Any cost sharing must be in accordance with the "cost sharing or matching" provisions of 15 C.F.R. Part 14. Costs included as cost share must be allocable to the project and allowable under the applicable federal cost principles. Costs incurred as non-Federal cost share are subject to the same allowability requirements as Federally-funded costs and are subject to audits.

B. For JVs, the JV Administrator is responsible for conducting a review of the SF-269s for each JV Partner prior to submission of a consolidated financial status report for the entire JV. This review must ensure that the financial information is consistent with each JV Partner's approved budget including each JV Partner's required cost sharing. The JV Administrator must resolve any discrepancies in the financial information prior to submitting the consolidated financial status report to NIST, and prior to making any withdrawal of funds. At the time of submission of the financial status report by the JV Administrator to NIST, the financial status report must reflect that the overall cost share is being met at the same rate that the Federal share is being spent.

C. Each JV Partner is responsible for meeting its cost-share commitment throughout the Award, at the same rate that the Federal share is being spent, in accordance with its approved budget. No JV Partner is responsible for the cost-share commitment of any other JV Partner. However, with the agreement of the JV Partners, along with notification to the NIST Grants Officer, a JV Partner that has exceeded its cost share commitment may allow its excess cost share to be used to make up for the cost share deficit of another JV Partner, so that the overall annual JV cost share is met.

D. The disallowance of any costs as a result of an audit could result in a Recipient's failure to provide its required cost share commitment. Whether it is a single or a JV Partner, if audit disallowances result in a Recipient's failure to meet its annual cost share, the Recipient shall reimburse the Federal Government for any account receivable resulting from such disallowance, regardless of the Federal funding amount, if any, that the Recipient may have received under the award.

8. KICK-OFF, ANNUAL REVIEW, AND CLOSEOUT MEETINGS, AND SPECIAL STUDIES

The Recipient, including each JV Partner, if applicable, shall participate in kick-off, annual review, and closeout meetings. The ATP Project Manager will provide the Recipient with meeting instructions in advance of these meetings.

Consistent with the requirements of the Government Performance and Results Act of 1993, Recipients may be asked from time to time to participate in special economic or case studies. All requests for participation in such studies will be in accordance with the Paperwork Reduction Act (PRA) requirements as implemented by 5 C.F.R. §1320, and will display a PRA approval number.

9. NOTIFICATION AND PRIOR APPROVAL REQUIREMENTS

A. The prior approval requirements in 15 C.F.R. §14.25, paragraph (e) MAY NOT be waived automatically by the Recipient and require written approval from the NIST Grants Officer.

In addition to the requirements specified in 15 C.F.R. §14.25, Recipients must obtain prior written approval from the NIST Grants Officer for the following changes:

(1) Any use of human subjects, such as interactions with live human beings or the use of data, images, tissue, and/or cells/cell lines from human subjects.

(2) Any use of vertebrate animals.

B. Joint Ventures

(1) Prior written approval of the NIST Grants Officer is required for any substitution and/or addition of JV Partners, change in JV Administrator, or revision to JV Agreement. However, any deletion of a JV Partner requires immediate notification to the NIST Grants Officer and ATP project manager.

(2) Proposed new JV Partners may not enter into any obligation, incur any expenditure, or engage in any activity that involves a commitment of Federal funds under this Award until the NIST Grants Officer has provided formal acceptance of the new JV Partner and revised JV Agreement.

(3) **Withdrawal of any JV Partner.** The notification must include the following information:

a. Date of the JV Partner's withdrawal.
b. Circumstances of the departure.
c. Plans, if any, for replacing the departing JV Partner.
d. An explanation of how this change will affect the project.

(4) When only two for-profit companies comprise a JV and one of them ceases participation, the project must be suspended until the NIST Grants Officer has provided formal approval of the revised JV Agreement. During the suspension period, the Recipient may not continue to enter into obligations, incur expenditures, and/or engage in any activity that involves a commitment of Federal funds under this Award.

C. Recipients must provide written notification to the NIST Grants Officer, with a copy to the ATP Project Manager, within THIRTY (30) calendar days of the occurrence of any of the following changes:

Ownership and/or dissolution of a Recipient company (including a JV Partner, if a JV). Revisions to ownership include, but are not limited to, mergers, acquisitions, change resulting in majority ownership by non-U.S. citizen(s), etc. In each instance, the notification must include the following information:

a. Date of final acquisition, merger, or change resulting in majority ownership by non-U.S. citizen(s), etc.
b. Name and address of any new foreign parent(s) and for each foreign parent(s), the percentage of ownership for each parent.
c. If the change results in majority ownership or control by non-U.S. citizen(s), the owner(s) and percentage of ownership for each.
d. Confirmation that the Recipient intends to complete its assigned tasks with the same commitment and at the same location.
e. Description of how this change in ownership will affect the project's projected benefits to the United States.

D. Recipients must provide written notification to the NIST Grants Officer and the ATP Project Manager within Fifteen (15) calendar days of any budget changes involving the transfer of funds among direct cost categories or between Joint Venture members if the amount of the transfer exceeds 10% of the approved total annual budget for any single Recipient or Joint Venture participant for an approved project year.

10. UNALLOWABLE PROJECT COSTS

In addition to unallowable costs in the applicable Federal Cost Principles, costs designated unallowable in Chapter 1, Section D.2 of the April 2007 *ATP Proposal*

Preparation Kit will be unallowable under this award.

11. PROGRAM INCOME

A. Program income earned during the project period shall be retained by the Recipient and shall be used to finance any non-Federal share of the project.

B. Recipients shall have no obligation to the Federal Government regarding program income earned after the end of the project period.

C. Costs incidental to the generation of program income may be deducted from gross income to determine program income, provided these costs have not been charged to the award

D. Proceeds from the sale of property shall be handled in accordance with the requirements of Property Standards in 15 C.F.R. §§14.30 through 14.37.

E. Recipients shall have no obligation to the Federal Government with respect to program income earned from license fees and royalties for copyrighted material, patents, patent applications, trademarks, and inventions produced under this award.

12. EQUIPMENT

Upon expiration of the project period, the Recipient shall submit to the NIST Grants Officer an inventory of equipment acquired with Federal funds, as prescribed in 15 C.F.R. §14.34, along with an "Equipment Disposition Certification." The certification provides the Recipient an opportunity to request authorization to continue to utilize the equipment for the purposes of the commercialization initiative. If approved by the NIST Grants Officer, the Recipient shall report to NIST every two years the condition of the equipment as long as the current market value is more than $5,000.

For Joint Venture awards, title to any equipment purchased under the award, including intangible property that meets the definition of equipment in 15 C.F.R. paragraph 14.2(n), that may be in the name of a departing JV Partner, and that is vital to the project, shall be transferred to another JV Partner as instructed by the JV Administrator for continued use on the project. The JV shall make compensation to the departing JV Partner for its contribution to the purchase of the equipment by applying its percentage of the cost of the equipment to the current fair market value of the equipment. Should the equipment no longer be needed on the project, the departing JV Partner shall request disposition instructions in accordance with 15 C.F.R. §14.34.

13. NON-COMPLIANCE WITH STATUTORY PURPOSE

If NIST determines that the statutory purposes of research and development under 15 U.S.C. §278n can no longer be served (e.g., the project is no longer high-risk), the Recipient shall be deemed in material non-compliance with award requirements. As a result, NIST may terminate the award pursuant to 15 C.F.R. §14.61.

14. INSTRUCTIONS FOR INTEREST PAYMENT

This award is subject to 15 C.F.R. §14.22 requiring recipients of Federal financial assistance to maintain advances of Federal funds in interest bearing accounts. Interest earned on Federal advances deposited in such accounts (with the exception of $250 per year, which may be retained for administrative expenses) shall be remitted promptly.

In keeping with Electronic Funds Transfer rules (31 C.F.R. §206), interest should be remitted to the HHS Payment Management System through an electronic medium such as the FEDWIR Deposit System. Electronic remittances should be in the format and should include any data that are specified by the HHS as being necessary to facilitate direct deposit in HHS' account at the Department of Treasury. The following website provides further instructions: **http://www.dpm.psc.gov/grant_recipient/funding_requests/returning_funds.aspx?**

It is the Recipient's responsibility to calculate accrued Interest on the excess Federal funds on hand from the date of the last payment made on this award. The minimum annual interest rate to be assessed is the Department of Treasury's Current Value of Funds Rate found at **http://www.fms.treas.gov/cvfr/index.html.**

15. AUDITS

Project audits (of Federal and non-Federal funds) are required for all ATP Recipients except when those Recipients are required to comply with the Single Audit Act of 1996 and the audit requirements of Office of Management and Budget (OMB) Circular A-133, "Audits of States, Local Governments and Non-Profit Organizations." Recipients and Subawardees, including universities who expend $500,000 or more in a year in Federal awards, are also subject to the audit requirements. A subawardee is defined as an organization which receives a portion of the financial assistance from the Recipient and assists the ATP Recipient in meeting the project goals, but does not include the procurement of goods and services.

A. ALL ATP Recipients, including each JV Partner (if a JV project), are required to provide sufficient funds as direct costs (unless included as indirect) in the project's multi-year budget to have project audits performed according to the Schedule shown in B. Below:

B. All Recipients shall schedule audits as follows:

(1) For awards less than 24 months, an audit is required within 90 days from the project expiration date.

(2) For 2-, 3-, or 4-year awards, an audit is required within 90 days after the end of the first year and within 90 days from the project expiration date.

(3) For 5-year awards, an audit is required within 90 days after the end of the first year and third year, and within 90 days from the project expiration date.

C. Audits of all Recipients (i.e., Single companies and JV Partners) shall be conducted in accordance with *Government Auditing Standards (GAS)*, issued by the Comptroller General of the United States (the Yellow Book).

If an ATP Recipient is required to have an audit performed in accordance with OMB Circular A-133, "Audits of States, Local Government, and Non-Profit Organizations," the annual OMB Circular A-133 audit is deemed to meet the ATP audit requirement.

If an ATP Recipient does not have an annual OMB Circular A-133 audit performed, the Recipient should follow the following project audit requirements:

(1) Audits for single company Recipients shall be conducted using the *September 1999 NIST Program-Specific Audit Guidelines for Advanced Technology Program (ATP) Cooperative Agreements with Single Companies* to the extent these guidelines do not conflict with the current award. Recipients will be provided updated guidelines when they become available. The guidelines can be found at http://www.atp.nist.gov/atp/psag-co.htm.

(2) Audits for joint venture Recipients shall be conducted using the *September 1999 NIST Program-Specific Audit Guidelines for Advanced Technology Program (ATP) Cooperative Agreements with Joint Ventures* to the extent these guidelines do not conflict with the current award. Recipients will be provided updated guidelines when they become available. The guidelines can be found at http://www.atp.nist.gov/atp/psag-jv.htm.

The program specific guidelines may be useful in identifying the allowability of specific cost elements and other programmatic compliance requirements for those recipients required to have an OMB Circular A-133 audit.

D. The Recipient shall submit **two (2) copies** of each audit report, one to the address shown in Article D.01.b. of the DoC

Financial Assistance Standard Terms and Conditions dated May 2007, and one copy to the NIST Grants Officer.

16. AWARD CLOSEOUT

A. In accordance with the guidelines established in 15 C.F.R. §14.71 and Term A.06 of the *DoC Financial Assistance Standard Terms and Conditions* dated May 2007, the NIST Grants Officer will allow only those costs that are strictly associated with closeout activities during the ninety (90) day period following the award expiration date. Closeout activities are normally limited to preparation of the final reports (technical, business, financial, patent/invention, equipment inventory) and closeout audit.

B. The final closeout meeting with NIST ATP is generally not considered a closeout-related activity. This closeout meeting should be conducted prior to the expiration date of the award. The Recipient must provide adequate funds in the project budget to ensure participation by all appropriate individuals in the closeout meeting. Costs associated with any closeout meeting held after the expiration date of the award may not be charged to the project unless specific, prior written approval is obtained from the NIST Grants Officer.

17. USE OF NAME OR ENDORSEMENTS

A. The Recipient and/or its Subrecipients or subcontractors shall not, without the prior written approval from NIST, use the name of NIST or the Department of Commerce on any product or service which is directly or indirectly related to either this award or any patent license or assignment agreement which relates to this award.

B. By entering into this award, NIST does not directly or indirectly endorse any product or service provided or to be provided by the Recipient, its successors, assignees, or licensees. The Recipient and its Subrecipients and subcontractors, shall not in any way imply that this award is an endorsement of any such product or service.

18. PUBLICATIONS

In any publications, the Recipient shall acknowledge support of the technology development by NIST. Normally this is done by a footnote reading, "This work was performed under the support of the U.S. Department of Commerce, National Institute of Standards and Technology, Advanced Technology Program, Cooperative Agreement Number 70NANBXHXXXX," or words to that effect.

19. PROTECTION OF HUMAN SUBJECTS

Research involving human subjects is not permitted under an ATP award unless expressly authorized by a Special Award Condition or otherwise in writing by the NIST Grants Officer.

As referenced in *the DoC Financial Assistance Standard Terms Conditions*, M.06, the Federal Policy for the Protection of Human Subjects (The Common Rule), codified by the Department of Commerce at 15 C.F.R. Part 27, requires Recipients to maintain appropriate policies and procedures for the protection of human subjects in research. The Common Rule defines a “human subject” as a living individual about whom an investigator conducting research obtains 1) data through intervention or interaction with the individual, or 2) identifiable private information. The term “research” means a systematic investigation, including research development, testing and evaluation, designed to develop or contribute to generalizable knowledge. The Common Rule also sets forth the categories of research that may be considered exempt from this policy.

In the event it becomes evident that a human subject may be involved in this project, the Recipient shall submit appropriate documentation to the ATP Project Manager for NIST institutional review and approval. Additional information and documentation requirements are set forth in the April 2007 booklet entitled, *“Guidelines and Documentation Requirements for Research Involving Human and Animal Subjects,”* available on the ATP website at

http://www.atp.nist.gov/atp/2007has.pdf. This documentation may include:

A. Documentation establishing review and approval of the project by a qualified Institutional Review Board (IRB). [NOTE: Recipients must provide documentation of continuing IRB approval by the cognizant IRB at appropriate intervals as designated by the IRB, but not less than annually];

B. Documentation to support an exemption for the project from The Common Rule;

C. Documentation to support a request for a deferral of review for research involving human subjects beginning after award of the project, but sufficiently in advance of the activity for NIST institutional review and approval.

D. Documentation of IRB approval of any modification to an IRB-approved existing protocol or informed consent form must be submitted to the ATP Project Manager for NIST Institutional review and approval.

No work involving human subjects may be undertaken, conducted, or costs incurred and/or charged to the project for this work, until the NIST Grants Officer approves the required appropriate documentation in writing.

20. CARE AND USE OF VERTEBRATE ANIMALS

Research involving live vertebrate animals is not permitted under an ATP award unless expressly authorized by a Special Award Condition or otherwise in writing by the NIST Grants Officer.

The DoC Financial Assistance Standard Terms Conditions, M.12, requires Recipients of financial assistance awards to comply with the Laboratory Animal Welfare Act (Public Law 89-544); as amended (7 U.S.C. §§2131 et seq.), and implementing regulations found at 9 C.F.R. Parts 1, 2, and 3; and other applicable statutes pertaining to the care, handling, or other activities supported by Federal financial assistance.

In the event it becomes evident that live vertebrate animals may be involved in this project, the Recipient shall submit appropriate documentation to the ATP Project Manager for NIST institutional review and approval. Additional information and requirements are set forth in the April 2007 booklet entitled, *"Guidelines and Documentation Requirements for Research Involving Human and Animal Subjects,"* available on the ATP website at http://www.atp.nist.gov/atp/2007has.pdf

ATP accepts documentation identifying the institution's required credentials for performing animal studies (e.g. OLAW animal welfare assurance number, USDA certificate number, or AAALAC accreditation) in lieu of an actual copy of applicable institutional credentials ((e.g., OLAW animal welfare assurance, USDA certificate, or AAALAC letter of accreditation). Since verification that assurances are valid and current can be made through official websites, generally only documentation of the applicable credential's identifier linked to the institution performing the animal studies is needed. NIST reserves the right to request a copy of the applicable institutional credentials (e.g., OLAW animal welfare assurance designation, USDA certificate, or AAALAC letter of accreditation), as warranted.

No work involving live vertebrate animals may be undertaken, conducted, and/or costs incurred and/or charged to the project for this work, until the NIST Grants Officer approves the required appropriate documentation in writing.

21. BUREAU OF INDUSTRY AND SECURITY (BIS) CLEARANCE

A. The Recipient agrees to adhere to U.S. export laws, as administered by U.S. BIS, and shall not export or re-export, directly or indirectly, any technical data created with Federal Government funding under this award to any country for which the United States Government or any agency thereof, at the time of such export or re-export, requires an export license or other Federal Governmental approval without first

obtaining such licenses or approval and the written clearance of the NIST Grants Officer.

B. The BIS shall conduct an annual review for any relevant information about the Recipient's compliance with U.S. export laws. NIST reserves the right to take appropriate action in accordance with 15 C.F.R. Part 14.62 and Term M.01 of *the Department of Commerce Financial Assistance Standard Terms and Conditions* (May 2007), if the BIS reports significant adverse information about the Recipient to the NIST Grants Officer.

22. LIABILITY

A. Property

The Federal Government shall not be responsible for damage to or resulting from any property provided to the Recipient, and/or its Subrecipients and/or subcontractors, and/or acquired by the Recipient, and/or its Subrecipients and/or subcontractors, pursuant to this award.

B. No Warranty

NIST makes no express or implied warranty as to any matter whatsoever, including the conditions of the research or any invention or product, whether tangible or intangible, made, or developed under this award, or the ownership, merchantability, or fitness for a particular purpose of the research or any invention or product made or developed under this award.

C. Disclaimer

(1) The United States expressly disclaims any and all responsibility to the Recipients or third persons for the actions of the Recipient or third persons resulting in death, bodily injury, property damage, or any other losses resulting in any way from the performance of this award or any subaward or subcontract under this award.

(2) The acceptance of this award by the Recipient does not in any way constitute an agency relationship between the United States and the Recipient.

D. Indemnification

(1) The Recipient, and/or its Subrecipients and/or subcontractors, agree to indemnify and hold harmless the U.S. Government for all liabilities, demands, damages, expenses and losses arising out of the use by the Recipient, its Subrecipients, subcontractors, and/or any party acting on their behalf or under their authorization, of products made by the use of technical developments arising under this agreement. This provision shall survive termination of this award.

(2) The Recipient, and/or its Subrecipients and/or subcontractors, agree to indemnify and hold harmless the U.S. Government for any loss, claim, damage, or liability of any kind involving the Recipient's, Subrecipient's, and/or subcontractor's employees arising in connection with this award.

E. Force Majeure

Neither party shall be liable for any unforeseeable event beyond its reasonable control not caused by the fault or negligence of such party, which causes such party to be unable to perform its obligations under this award (and which it has been unable to overcome by the exercise of due diligence), including, but not limited to: flood, drought, earthquake, storm, fire, pestilence, lightning and other natural catastrophes, epidemic, war, riot, civil disturbance or disobedience, strikes, labor dispute, or failure, threat of failure, or sabotage of the Recipient or subcontractor facilities, or any order or injunction made by a court or public agency. In the event of the occurrence of such a *force majeure* event, any party unable to perform shall promptly notify the other party(ies). It shall further use its best efforts to resume performance as quickly as possible and shall suspend performance only for such period of time as is necessary as a result of the *force majeure* event.

23. INFORMAL COLLABORATORS

All informal collaborators in ATP awards are subject to ATP intellectual property regulations as specified in 15 C.F.R §295.8.

Informal collaborator means any individual or organization which consults, cooperates with, or participates in the performance of this award, and is not included in the approved award budget.

24. INTELLECTUAL PROPERTY

A. Patent Notification Procedures

This General Term implements *Department of Commerce Financial Assistance Standard Term and Condition M.04.b.,* which states that, pursuant to Executive Order 12889, the DoC is required to notify the owner of any valid patent covering technology whenever the DoC or its financial assistance Recipient, without making a patent search, knows (or has demonstrable reasonable grounds to know) that technology covered by a valid United States patent has been or will be used without a license from the owner. To ensure proper notification, if the Recipient uses or has used patented technology under this award without a license or permission from the owner, the Recipient must notify the NIST Grants Officer:

National Institute of Standards and Technology
Grants and Agreements Management Division
100 Bureau Drive, Mail Stop 1650
Gaithersburg, MD 20899-1650

The notification shall include the following information:

A. The award number
B. The name of the DoC awarding agency
C. A copy of the patent
D. A description of how the patented technology was used
E. The name of the Recipient contact, including an address and telephone number

B. Rights in Data

(1) The Federal Government shall have certain rights to use data first produced in the performance of the award, whether or not the data are copyrighted. The Recipient may establish claim to copyright subsisting in any data first produced in the performance of the award. When claim is made to copyright, the Recipient shall affix the applicable copyright notice of 17 U.S.C. §401 or 402 and acknowledgment of Federal Government sponsorship to the data when and if the data are delivered to the Federal Government, are published, or are deposited for registration as a published work in the U.S. Copyright Office. The Recipient shall grant to the Federal Government, and others acting on its behalf, a paid up, nonexclusive, irrevocable, worldwide license for all such data to reproduce, prepare derivative works, perform and display publicly, and for data other than computer software to distribute to the public by or on behalf of the Federal Government.

(2) The licenses granted to the Federal Government under this Term shall not be considered as a waiver of the nondisclosure requirements of 15 U.S.C. §278n(d)6: "Intellectual property owned or developed by any business receiving funding may not be disclosed by any officer or employee of the Federal Government except in accordance with a written agreement between the owner or developer and the Program."

C. Patent Rights

(1) Definitions

(a) “Company" means a for-profit organization, including sole proprietors, partnerships or corporations.

(b) "Invention" means any invention or discovery which is or may be patentable or otherwise protectable under Title 35 of the United States Code.

(c) “Made” means, when used in relation to any Invention, the conception or first actual reduction to practice of such invention.

(d) "Practical Application" means to manufacture in the case of a composition or product, to practice in the case of a process or method, or to operate in the case of a machine or system; and, in each case, under such conditions as to establish that the invention is being utilized and that its benefits are, to the extent permitted by law or Federal Government regulations, available to the public on reasonable terms.

(e) "Subject Invention" means any invention of the Recipient conceived or first actually reduced to practice in the performance of work under this award.

(2) Ownership of Inventions

Pursuant to the statute that establishes the ATP (15 U.S.C. §278n(d)(11)), this paragraph takes precedence over 15 C.F.R. §14.36 and DoC Financial Assistance Standard Terms and Conditions, dated May 2007, article M.04. The Recipient or, if appropriate, its Subrecipients, contractor(s) and/or subcontractor(s), shall have the entire right, title, and interest throughout the world to each Subject Invention according to the provisions of this clause, provided that this party is a company or companies organized in the United States. Joint ventures shall provide to NIST a copy of their written agreement, which defines the disposition of ownership rights among the members of the joint venture, and their contractor and/or subcontractors as appropriate, in accordance with the second sentence of this paragraph. However, the United States hereby reserves a nonexclusive, nontransferable, irrevocable paid-up license, to have practiced for or on behalf of the United States, any such invention. Title to any such invention shall not be transferred or passed, except to a company organized in the United States, until the expiration of the first patent obtained in connection with such invention.

(3) Invention Disclosure, United States License and Filing of Patent Application by Recipient

(a) The Recipient shall disclose each subject invention to NIST within **two months after the inventor discloses it** in writing to Recipient personnel responsible for patent matters. The disclosure to NIST shall be in the form of Recipient's electronic disclosure submission through the Interagency Edison extramural invention reporting system (iEdison) at www.iedison.gov and the disclosure shall identify the award under which the invention was made and the inventor(s) and at a minimum, also contain the following information:

i. the title of the invention;
ii. the names of all inventors;
iii. the name and address of the assignee (if any);
iv. an acknowledgement that the United States has rights in the subject invention (i.e., the Governmental Use License);
v. the filing date of the present invention;
vi. an abstract of the disclosure;
vii. a description or summary of the present invention;
viii. the background of the present invention or the prior art;
ix. a description of the preferred embodiments
x. what matter is claimed

To the extent not inconsistent with any ATP requirements, Recipient shall comply with all disclosure, election, and/or other reporting requirements of iEdison, and shall update all such information as necessary.

Each report shall also include the use of the invention and whether a manuscript describing the invention has been submitted for publication and, if so, whether it has been accepted for publication at the time of disclosure. In addition, after disclosure to NIST via iEdison, the Recipient will promptly notify NIST via iEdison of acceptance of any manuscript describing the invention for publication or of any sale or public use planned by the Recipient by specifying the date of such publication, or sale, or public use of the invention in the proper iEdison field(s).

(b) The Recipient shall notify NIST via iEdison **within two years** of the date the invention required to be disclosed to NIST

via iEdison whether or not the Recipient intends to file a patent application on any subject invention.

If a patent is issued, or applied for, the Recipient(s) must submit the following information to NIST via iEdison:

1. The award number under which the invention was made;
2. The serial number of the patent issued or applied for;
3. The date of issuance or application;
4. A copy of the disclosure as issued (including the drawings) and;
5. The name(s), address, and telephone number(s) of an assignee.

In a JV award, the JV Administrator must submit the patent information to NIST via iEdison for all JV Partners. In order to prevent disclosure of information to the general public under the Freedom of Information Act (FOIA) or any other statute, each page of each patent report should be marked, "CONFIDENTIAL/PROPRIETARY."

(c) Requests for extension of the time for disclosure, election, and filing under paragraphs 24.C.(3)(a) and (b) of this Term may be permitted at the discretion of NIST.

(4) Recipient Action to Protect the Government's Interest

(a) The Recipient will, via iEdison, execute, or have executed, all instruments necessary to establish or confirm the rights the United States Government has throughout the world in those subject inventions to which the Recipient has filed a patent application in which the United States has reserved a non-exclusive license.

(b) The Recipient shall require, by written agreement, its employees, other than clerical and nontechnical employees, to disclose promptly in writing to personnel identified as responsible for the administration of patent matters and in a format suggested by the Recipient, each subject invention made under the award in order that the Recipient can comply with the disclosure provisions of paragraph C.(3) of this Term, and to execute all papers necessary to file patent applications on subject inventions and to establish the Government's rights in the subject inventions. This disclosure format should require, as a minimum, the information required by C.(3)(a) of this Term. The Recipient shall instruct such employees through employee agreements or other suitable education programs on the importance and requirements of reporting inventions in sufficient time to permit the filing of patent applications prior to United States or foreign statutory bars.

(c) The Recipient shall promptly notify NIST via iEdison of any decisions not to continue the prosecution of a patent application, the payment of maintenance fees, or the defense in a reexamination or opposition proceeding on a patent in any country.

(d) The Recipient agrees to include, within the specification of any United States patent application and any patent issuing thereon covering a subject invention, the following statements:

This invention was made with United States Government support under (identify the cooperative agreement number) awarded by the National Institute of Standards and Technology (NIST).

The United States Government has certain rights in the invention.

(5) Subawards and Subcontracts

The Recipient shall include in all subawards and subcontracts, **regardless of tier**, for experimental, developmental, or research work, a patent rights clause, as appropriately modified, comparable to this term. However, pursuant to the statute establishing the ATP (15 U.S.C. 278n(d)(11)), the patent rights clause shall also provide that title to each subject invention made by the Subrecipient or subcontractor shall vest with a company or

companies incorporated in the United States.

(6) Reporting on Utilization of Subject Inventions

The Recipient agrees to submit on request, no more frequently than annually, periodic reports on the utilization of a subject invention or on efforts at obtaining such utilization that are being made by the Recipient or its licensees or assignees. Such reports shall include information regarding the status of development, date of first commercial sale or use, gross royalties received by the Recipient, and such other data and information as NIST may reasonably specify. The Recipient also agrees to provide additional reports as may be requested by NIST in connection with any march-in proceeding undertaken by NIST in accordance with paragraph C.(8) of this Term. Such information shall be treated by NIST as commercial and financial information and thus as privileged and confidential and not subject to disclosure under §552 of Title 5 of the United States Code.

(7) Preference for United States Industry

Notwithstanding any other provision of this Term, the Recipient agrees that neither it nor any assignee will grant to any person the exclusive right to use or sell any subject inventions in the United States unless such person agrees that any products embodying the inventions will be manufactured substantially in the United States. However, in individual cases, the requirement for such an agreement may be waived by NIST upon a showing by the Recipient or its assignee that reasonable but unsuccessful efforts have been made to grant licenses on similar terms to potential licensees that would be likely to manufacture substantially in the United States or that, under the circumstances, domestic manufacture is not commercially feasible.

(8) March-in Rights

The Recipient agrees that, with respect to any subject invention in which it has acquired title, NIST has the right, in accordance with procedures in 37 C.F.R. §401.6 and any supplemental regulations of NIST, to require the Recipient, an assignee, or an exclusive licensee of a subject invention to grant a nonexclusive, partially exclusive, or exclusive license in any field of use to a responsible applicant or applicants, upon terms that are reasonable under the circumstances. If the Recipient, assignee, or exclusive licensee refuses such a request, NIST has the right to grant such a license itself if NIST determines that:

(a) Such action is necessary because the Recipient or assignee has not taken, or is not expected to take within a reasonable time, effective steps to achieve practical application of the subject invention in such field of use;

(b) Such action is necessary to alleviate health or safety needs which are not reasonably satisfied by the Recipient, assignee, or licensees;

(c) Such action is necessary to meet requirements for public use specified by Federal regulations and such requirements are not reasonably satisfied by the Recipient, assignee, or licensees; or

(d) Such action is necessary because the agreement required by paragraph C.(7) of this Term has not been obtained or waived or because a licensee of the exclusive right to use or sell any subject invention in the United States is in breach of the agreement required by paragraph C.(7) of this Term.

(9) Conflicts Between ATP Intellectual Property Provisions and Non-U.S. Country Intellectual Property Provisions

The intellectual property provisions in the ATP statute, rule, and General Terms and Conditions require that any intellectual property arising from an ATP-funded project shall vest with a for-profit company organized in the United States. If the

Recipient's proposal includes work approved by the Grants Officer to be performed in a non-U.S. country, by accepting this award, the Recipient certifies that no legal requirement exists in that country those conflicts with the ATP intellectual property requirements, including the U.S. Government license provisions.

25. STATUTORY REFERENCE

All references to the ATP statute (15 U.S.C. §278n) contained in this award, including the September 2007 ATP Special Award Conditions and these ATP General Terms and Conditions, mean the ATP statute as it existed prior to the enactment of the America COMPETES Act (Pub. L. 110-69) on August 9, 2007.

First-time Grantee Workshop U.S. DoC Inspector General

First time Grantee Workshop

US DoC Inspector General

Main Commerce Learning Center

The Commerce Learning Center (CLC) is a Learning Management System (LMS) which provides one location where you can come to for training and professional development. The site provides access to all training including web-based training (WBT) and instructor- led training (ILT). The CLC also contains over 3,000 SkillSoft online courses on a wide range of topics: Desktop applications, IT, Leadership and Management, EEO, Diversity and Project Management.

The CLC is available to all Federal career employees and approved associates and contractors.

If you need help getting an account you can go to your bureau home page and contact the appropriate party:

Bureau of Economic Analysis	https://doc.learn.com/other
Bureau of Industry and Security (BIS)	https://doc.learn.com/other
Bureau of the Census Economic Development Agency	https://doc.learn.com/other
International Trade Administration	https://doc.learn.com/other
Minority Business Development Agency	https://doc.learn.com/other
National Institute of Standards and Technology	https://doc.learn.com/NIST
National Oceanic and Atmospheric Administration	https://doc.learn.com/NOAA
NOAA National Weather Service	https://doc.learn.com/NOAA/NWS
Office of Inspector General	https://doc.learn.com/other
Office of the Secretary	https://doc.learn.com/other
US Patent and Trademark Office	https://doc.learn.com/PTO

First-time Grantee Workshop

U.S. Department of Commerce
Office of Inspector General

OIG Audit History With First-time Recipients

- NIST Advanced Technology Program
  - Many start-up companies
  - Awards to single companies and joint ventures
  - Pre-award accounting system surveys and cost audits
- NIST Manufacturing Extension Partnership (MEP)
- NTIA Public Safety Interoperable Communications (PSIC) Program
  - State agencies without cost sharing experience
- Agency requests for preaward audit
  - Metropolitan Television Alliance (NTIA)
  - Mid-America Research Institute (NOAA)

A Grant Is a Cost-Reimbursement Agreement

- **An allowable cost must meet all of the following**
  - ***Allowable***
    - **Laws, cost principles, other regulations, terms and conditions of grant**
  - ***Allocable***
    - **Did it benefit the project?**
  - ***Reasonable***
    - **Would a reasonable person have spent this much?**
  - ***In conformance with generally accepted accounting principles (GAAP)***
    - **Must be a real cost reflected in the accounting records**

Sources to Determine Allowability

- Federal cost principles
  - Colleges and universities
    - OMB Circular A-21 (2 CFR Part 220)
  - State, local, and tribal governments
    - OMB Circular A-87 (2 CFR Part 225)
  - Nonprofit organizations
    - OMB Circular A-122 (2 CFR Part 230)
  - Commercial organizations
    - FAR cost principles (48 CFR Part 31)
- Commerce Learning Center course on cost principles
  - https://doc.learn.com/learncenter.asp?sessionid=3-EB587215-FEE3-4F1E-81AD-578D895C2A40&DCT=1&id=178409&page=64

Sources to Determine Allowability

- **Federal administrative requirements**
  - **State, local, and tribal governments**
    - **OMB Circular A-102 (15 CFR Part 24)**
  - **Nonprofits, colleges and universities, commercial entities (Commerce policy)**
    - **OMB Circular A-110 (15 CFR Part 14)**
- **Sources of audit findings**
  - **Minimum standards for accounting and procurement systems**
  - **Disbursement policies (advances)**
  - **Valuation of contributions**
  - **Program income**

Sources to Determine Allowability

- **Commerce Standard Terms and Conditions**
  - **10% limitation on transfers among direct cost categories**
  - **No transfers among direct and indirect cost budgets**
  - **No indirect costs unless specifically included in budget**
  - **Federal share of indirect costs limited to lesser of budget line item or "actual"**

Sources to Determine Allowability

- **General terms and conditions**
  - Implement program rules
  - Limitations on noncash contributions
  - Limitations on categories of costs (e.g., travel, supplies, indirect)
- **Special award conditions**
  - Specific to this recipient
  - Often to correct deficiencies in recipient performance or compliance

Nonfederal Matching Share

- "Cost sharing or matching means that portion of project or program costs not borne by the Federal Government" (15 CFR Section 14.2(j))
  - Not "What can we find to claim in order to receive federal money?"
  - Must be real costs that meet allowability standards
- As applied in Commerce, there is no distinction between a "federal" and "nonfederal" cost
  - "If actual allowable costs are less than the total approved budget, the Federal and non-Federal cost shares shall be calculated by applying the approved Federal and non-Federal cost share ratios to actual allowable costs" (Commerce Standard Terms and Conditions, Section A.03a)

Effect of Disallowed Costs

- **Assume a grant with total budget of $1,000,000 and an 80% federal share. Auditor finds $25,000 of questioned costs, which grants officer disallows.**

Costs claimed	$1,000,000
Costs disallowed	$25,000
Costs allowed	$975,000
Federal sharing ratio	x 80%
Federal funds earned	$780,000
Federal funds disbursed (assume 80% of $1,000,000)	$800,000
Refund due the government	$20,000

Historical Matching Share Issues

- **Transfers among "partners"**
  - **Must be allocable**
  - **Nature of relationship?**
    - **Subrecipient?**
      - **Must be at cost**
    - **"Co-recipient?"**
      - **Must be at cost**
    - **Third-party in-kind contributor?**
      - **Generally based on fair market value, except for donated services**
- **Benefit to project**

Historical Matching Share Issues

- Cash contributions are not matching share until expended on allowable project costs
- In-kind contributions are received from third parties, not from the recipient
  - Allowable value for equipment contributed by recipient cannot exceed book value unless special arrangements made with grants officer
  - Intracompany transfers at cost or transfer price (48 CFR Section 31.205-26(e))
  - Allowable value for donated services is not fair market value
  - Recipient must record income for contributions received

Indirect Costs

- A system for allocating shared costs among "cost objectives"
- Rates negotiated with a cognizant federal agency on behalf of the federal government
  - Usually shown as a percentage
  - "Reasonable" differs by industry and by company
- Must meet allowability standards

Historical Indirect Cost Issues

- No indirect costs in approved budget
  - Commerce Standard Terms and Conditions limit indirect costs to lesser of budget or "actual"
  - Start-up company has no indirect until it gets new business
- No approved rate
- Proposed amount not based on costs
- Indirect costs hidden in direct line items
- Transfers of budget between direct and indirect

Relationships Among "Partners"

- **3 types of relationships with recipients**
  - ***Contractor***
    - **Provides ("sells") goods or services to a recipient for use under the grant**
    - **Terms and conditions do not flow down**
    - **Not limited to cost reimbursement unless specified in contract**
    - **Examples: technical consultant, accountant, attorney**
  - ***Subrecipient***
    - **Assists the recipient in achieving objectives of statement of work**
    - **Terms and conditions flow down**
    - **Direct federal recipient delegated most oversight responsibilities**
    - **Reimbursement for allowable costs**
    - **Examples: technical or geographic allocation of work scope**

Relationships Among "Partners"

- 3 types of relationships with recipients (continued)
  - *Third-party in-kind contributor*
    - Donates goods or services to a recipient for use under the grant
      - Imagine a contractor that does not charge the recipient
    - Terms and conditions do not flow down
    - Value of contribution based on OMB circulars
    - Examples: landlord donates space, large company provides staff for smaller recipient, volunteer labor
- Fourth relationship: *Co-recipient*
  - Not mentioned in OMB circulars
  - Each party individually responsible/liable for its budget and performance
  - Terms and conditions automatically apply to all
  - Reimbursement for allowable costs
  - Example: NIST Advanced Technology Program (ATP) joint venture

Historical Recipient Relationship Issues

- Poor or nonexistent oversight of subrecipients
- Failure to obtain necessary approvals
- Improper valuation of contributions
  - Recipients cannot make in-kind contributions to themselves (cannot use fair market value)
  - Donated services limited to salary plus benefits
  - Discounts are not in-kind contributions
- The nature of the relationship determines what it is, **not** the words on top of the agreement

Recipient Administrative Systems

- OMB circulars provide minimum standards
  - 15 CFR Part 24 for state, local, tribal governments
  - 15 CFR Part 14 for everyone else
- Must provide a transaction trail to document allowability of costs
- Must have procurement standards
- Must have property standards
- Must have written code of conduct
- Must have written procedures
  - To distinguish between allowable and unallowable costs
  - To minimize time elapsing between receipt and disbursement of federal funds

Historical Administrative Systems Issues

- Lack of documentation
  - Failure to document direct labor
  - Missing or inadequate vendor invoices
  - Claims based on estimates rather than actual costs
- Lack of CFO or accountant with federal grant or contract experience
- Lack of central accounting system and supporting documentation for cost claimed
- Excessive or unnecessary advances
- Failure to establish standards and procedures
- Conflicts of interest and related-party transactions

Audits

- OMB circular A-133 establishes audit requirements for governmental units, colleges and universities, and nonprofits
  - Must have a comprehensive single audit for any year it expends at least $500,000 in cumulative federal award funds
- Commerce Standard Terms and Conditions require periodic (at least every 2 years) audits of other recipients "when the federal share amount awarded is $500,000 or more over the duration of the project period." (DOC Standard Terms and Conditions, Section D.01.b)
- Some programs establish program-specific audit guidelines
- Some programs require accounting system certifications
- Cost of audit and accounting system certification can be allowable under the grant
  - If so, applicants should provide for these costs in their proposed budgets

Historical Issues With Outside Audits

- Required audits not performed
- Outside auditors lack experience with Commerce programs and requirements
- Accounting system certifications become marketing engagements
- Auditors engaged by recipient do not always act in best interest of the government
- Commerce grants often too small to be covered by single audit

Questions?

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Missing Audit Reports from NIST ATP Grant Recipients Final Report ATL — 19891 March 31. 2010

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KA-3453

UNITED STATES DEPARTMENT OF COMMERCE
Office of Inspector General
Washington, D.C. 20230

KA-3453

March 31, 2010

MEMORANDUM FOR: Dr. Patrick Gallagher, Director
National Institute of Standards and Technology

FROM: Dr. Brett M. Baker
Assistant Inspector General for Audit

SUBJECT: Missing Audit Reports from NIST ATP Grant Recipients
Final Report ATL – 19891

We are providing the final report on our inspection to determine the extent to which NIST grant files are missing audit reports that Advanced Technology Program (ATP) grant recipients are required to submit. NIST's Grants and Agreement Management Division is responsible for collecting and reviewing these reports and maintaining the grant files.

Our review found that NIST had not met its responsibilities to monitor the ATP awards by collecting recipient audit reports and ensuring that recipients have the required audits conducted. NIST identified 213 awards with project costs totaling $482 million that did not have audit reports as part of their records, and it did not know whether these grant recipients had actually conducted the audits.

We recommend that the director of NIST require that agency management collect the missing audit reports and provide the Office of Inspector General (OIG) with copies, suspend funding to grantees that do not provide missing reports, and ensure that NIST meets its monitoring responsibilities.

NIST management generally agreed with our assessment and informed us that they will provide an action plan to address our finding and recommendation within 30 days.

Background

ATP works through partnerships with private-sector grant recipients to develop innovative technologies that promise significant commercial payoffs and widespread benefits for the nation. ATP was set up as a cost reimbursement program that grants awards up to 5 years. Some awards require that the grant recipients provide matching funds while others are fully funded by ATP.

The program started in 1990 and received its final funding in 2007; it is scheduled to close out in 2012. ATP has been replaced by the recently created Technology Innovation Program (TIP), which provides cost-shared awards to industry, universities, and consortia for research on potentially revolutionary technologies that address critical national and societal needs.

Under Department of Commerce and NIST regulations, grant recipients must submit to NIST and OIG independent audits of project costs; the audits must be conducted at certain intervals during the performance of the project and at its completion. The reports are among the tools used by NIST project managers and grant officials to ensure federal funds are spent for their intended purpose. OIG reviews the audit reports for completeness and reportable findings and maintains a database of the audit reports. We publish the results of our review in our *Semiannual Report to Congress*, where we identify the number of reports reviewed, the federal costs audited, and the costs questioned.

Objective, Scope, and Methodology

The objectives of our review were

- to determine if NIST, as part of the grant monitoring process, obtained audit reports to ensure that grantees have obtained required project audits, and
- to identify awards that are missing audit reports, and the total related project costs. Our review covered audit reports that were due from the program's inception in 1990 through awards that expired in May 2007.

We reviewed *Department of Commerce Financial Assistance Standard Terms and Conditions*, *Advanced Technology Program General Terms and Conditions*, and the *ATP Proposal Preparation Kit*. We met with NIST officials responsible for grant and project oversight. We requested and obtained a list from NIST showing missing audit reports for awards that expired as of May 2007. Given the extensive time it would have taken to analyze ATP grants from the program's inception we did not verify the accuracy of the NIST information. Our work was performed in accordance with the *Quality Standards for Inspections* (rev. January 2005) issued by the President's Council on Integrity and Efficiency, and under authority of the IG Act of 1978, as amended, and Department Organization Order 10-13, dated August 31, 2006.

Finding

During our 2008 report review process, we noted a number of grant records that were missing audit reports. In April 2008, we informed NIST officials of this situation and inquired as to the total number of missing reports. In June 2009, NIST provided us with a list of 213 awards (with a total of $482 million in project costs, including federal and recipient shares) that were missing audit reports. NIST did not know whether these projects had been subject to independent audit.

The *Advanced Technology Program General Terms and Conditions, September 2007,* Section 15.B and D state:

> B. All Recipients shall schedule audits as follows:
>
> 1. For awards less than 24 months, an audit is required within 90 days from the project expiration date.
> 2. For 2-, 3-, or 4-year awards, an audit is required within 90 days after the end of the first year and within 90 days from the project expiration date.
> 3. For 5-year awards, an audit is required within 90 days after the end of the first year and third year, and within 90 days from the project expiration date.
>
> D. The Recipient shall submit two (2) copies of each audit report, one to … [OIG] and one copy to the NIST Grants Officer.

During the exit conference with OIG, NIST officials stated that the inability to collect audit reports was caused by (1) high staff turnover, (2) non-responsiveness of award recipients, and (3) the grants office's lack of legal remedies for dealing with non-compliant award recipients.

By not diligently monitoring audit report submissions, NIST did not ensure that $482 million in project costs have been properly audited. This increases the risk of misuse of federal funds. NIST needs to improve its management oversight procedures, not only to correct ATP problems but also to reduce the future risk of misuse of federal funds in ATP's successor program, TIP.

Recommendation

We recommend that the director of NIST require that agency management collect the missing audit reports and provide OIG with copies, suspend funding to grantees that do not provide missing reports, and ensure that NIST meets its monitoring responsibilities.

cc: Rachel Kinney, Audit Liaison, NIST
Melinda Chukran, Audit Resolution Officer, NIST
Dr. Lorel Wisniewski, Acting Director of TIP, NIST
Laura Cesario, GAMD Division Chief, NIST
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